91-433

Supreme Court, U.S.
FILED
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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FLETCHER J. CAMPBELL,

Petitioner,

vs.

MICHAEL ALLEN SCHWARTZ, Grievance Administrator, State of Michigan Attorney Grievance Commission,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

FLETCHER J. CAMPBELL

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Petitioner In Pro Se

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT THE MICHIGAN SCHEME OF ATTORNEY DISCIPLINE, IN WHICH THE MICHIGAN SUPREME COURT DELEGATES ITS DISCIPLINARY AUTHORITY TO THE ATTORNEY DISCIPLINE BOARD, IS UNCONSTITUTIONAL.

II. WHETHER OR NOT THE PROSECUTION ALTERATION, CHANGING AND TAMPERING WITH EVIDENCE SECURED SECRETLY DURING THE PRE-FORMAL COMPLAINT STAGE IS VIOLATIVE OF THE UNITED STATES CONSTITUTION OR SHOULD RESULT IN DISMISSAL OF THE PROSECUTION OF THE PETITIONER UNDER THE INHERENT SUPERVISORY POWERS OF THE COURT TO DETER SUCH FUTURE ACTS.

III. WHETHER OR NOT PETITIONER WAS DENIED A FAIR TRIAL WHERE UNEXCISED EVIDENCE WAS ENTERED IN THE TRIAL AND ON THE RECORD OF A CLEARLY HEARSAY NATURE WHICH REASONABLY AFFECTED THE JUDGMENT AGAINST THE PETITIONER.

IV. WHETHER OR NOT FORMAL COMPLAINT ADB 25-88 SHOULD HAVE BEEN DISMISSED TO ENSURE DUE PROCESS WHERE THE PANEL DID NOT HOLD A PUBLIC HEARING WITHIN THE PRESCRIBED FIFTY-SIX DAYS.

V. WHETHER OR NOT THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE DENIED WHERE SEPARATE AND DISTINCT FORMAL COMPLAINTS WERE CONSOLIDATED, DISCOVERY OUTSIDE THE SCOPE OF THE RULES WAS ALLOWED TO THE PROSECUTION, AND A HYBRID HEARING FORMAT OF AN UNPRECEDENTIAL NATURE WAS ESTABLISHED BY THE BOARD.

VI. WHETHER OR NOT THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE DENIED WHERE ACCESS TO THE MINUTES OF THE BOARD AND THE MASTER'S LIST UNDERLYING THE APPOINTMENT OF A MASTER WAS DENIED.

LIST OF ALL PARTIES TO THE PROCEEDING

State of Michigan Attorney Discipline Board[1]

State of Michigan Attorney Grievance Commission[2]

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[1] The Attorney Discipline Board is the adjudicative arm of the Michigan Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan Attorneys [Michigan Court Rules, ("MCR") Rule 9.110(A)]. Except as provided by MCR 9.120 [i.e. conviction of a criminal offense] a Complaint begins a formal proceeding [MCR 9.115(B)].

[2] The Attorney Grievance Commission is the prosecution arm of the Michigan Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan Attorneys [MCR 9.108].

PARTIES (con'd)

Michigan Supreme Court[3]

Frank J. Kelly, Esq.
Attorney General State of Michigan[4]

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[3] The Michigan Supreme Court is given the exclusive power under Michigan Statutes [e.g., Revised Judicature Act, Mich Comp Laws Ann §600.910 (West 1981)]. The Revised Judicature Act ["RJA"] conforms with Article 6, paragraph 1 of the Michigan Constitution, which declares that the entire judicial power of the state is vested exclusively in one Court of justice [Mich Const. Art.6 §1]. The Michigan Supreme Court has delegated its disciplinary power to the Attorney Discipline Board [See, supra note 1], a non-judicial body which is an independent authority created by the Michigan Supreme Court that is totally autonomous [MCR 9.107 (B)]. The position of Grievance Administrator is created by MCR 9.109(A). Nevertheless, the Attorney Discipline Board's decision is absolutely final [MCR 9.110(D)] and, unless leave to appeal is granted, the Michigan Supreme Court does not hear the case, and disbarment is final without judicial intervention.

[4] Frank J. Kelly is the Attorney General for the State of Michigan. His name and department is listed in these proceedings before this Honorable Court because the constitutionality of Michigan Statute(s) is drawn in question, and his department is not a party. In accordance with 28 U.S.C. §2403(b) the initial pleading, or paper before this Honorable Court may be applicable and shall be served upon the Attorney General of the State [Sup. Ct.R., Rule 29.4(c)].

TABLE OF CONTENTS

	Page(s)
Questions Presented for Review	1
List of All Parties To The Proceedings	2,3
Table of Contents	4
Table of Authorities	4-16
Reference To Official Reports of Opinions Delivered Below	16
Concise Statement of Grounds On Which Jurisdiction Is Invoked	17-18
Constitutional Provisions, Statutes and Regulations Involved	18-21
Concise Statement of Material Facts To Consideration of Questions Presented	21-30 A115-A160
Direct and Concise Argument For Allowance of Writ of Certiorari ..	31-71
Appendix	App.1 thru App.161

TABLE OF AUTHORITIES[(i)]

[(i) Where the authorities' page number is preceded by an "A" material is found in the Appendix in accordance with Sup.Ct.R. 14.1(h)&(k) under that page]

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430 Mich 241 (1988) 42-43

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-v- Montgomery,
275 Mich 504; 267 N.W.550 (1936).. A147

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90 L.Ed.2d. 69 (1986) A123-A124

Boyle -v- United States, 22F3d.547
(CA 8 Neb., 1927) A159

Candler -v- Heigho, 208 Mich 115,
121 (1919) 65

Chandler -v- Nash, 5 Mich 409 (1858) 38

Commonwealth -v- Fronheiser, (1925)
6 Pa D&C 710, 11 Leh Co LJ 209,
39 York Leg Rec 135 ..... A159

Communist Party -v- Subversive
Activities Control Board,
351 U.S 115 (1956) 46

Crane -v- People, 91 Colo 21;
11P2d 567 ..... A158

Davis -v- Kramer Bros. Freight Lines,
361 Mich 371, 376 (1960) A141

Davis -v- State, 43 GA App 122;
157 SE 88 (1931) A154

DeNike -v- County of Otsego, 45 Mich
App 711, 714 (1973) A141

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Evans -v- State, (1931) 46 Ga App 39, 166 SE 449 (recognizing rule) (1931) A158

Ex Parte Gilliland, 284 Mich 604 (1938) A130

Ex Parte Johnston, 3 Cal 2d 32; 43 P 2d 541 (1935) A159

Ex Parte Secombe, 19 How.9, 13 (1856) 70

Finch -vs- State, 87 CA App 426; 74 SE 2d 121 (1953) A154

Fletcher J. Campbell -v- Ophelia Mason, Docket #86326 (05-27-87); ____ Mich App ____ A139,A140

Garland, 71 U.S. at 371 32

Hand -v- State, 90 Ga App 452, 83 SW2d 276 (1954) A158

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In Re Clink, 117 Mich 619 (1898) ... 53

In Re Day, 181 Ill 73; 54 NE 646 (1899) 33

In Re Emmons, 330 Mich 303; 47 NW2d 620 (1951) 35

In Re Integration of Nebraska State Bar Association, 144 Neb 283; 275 NW 265, 267 (1937) 32,39

In Re Integration of State Bar of Oklahoma, 85 Okla 505; __; 95 P 2d 112, 114 (1939) 32,39

In Re L'Esperance Estate, 131 Mich App 496 (1984) A140

In Re Ruffalo, 390 U.S. 544; 20 L.Ed.117 (1968) 53,65, A126,A151 A156

In Re Salzbury, 217 Mich 260; 47 NW 404 (1922) 35

In Re Summers, 325 U.S.561 (1945) .. 37

In Re Thacker Estate, 137 Mich App 253 (1984) A138-A139

In The Matter of the Application of Gault, 384 U.S. 541; 16 L.Ed.2d. 1013 (1966) A125

Industrial Union Department -v- American Petroleum Inst., 448, U.S. 608 (1980) 40

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Jones -v- Hicks, 358 Mich 474; 100 N.W.2d 243 (1960) A147

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Nemes -v- Smith, 37 Mich App 124; 194 NW2d 440 (1971) A147

Pierson -v- Pierson, 351 Mich 637; 88 N.W.2d 500 (1958) A147

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People -v- Donaldson, 65 Mich App 588 (1975)	61
People -v- Doxie, 34 Cal App 2d 511, 93 P2d 1068 (1939)	A158
People -v- Grant, 105 Cal App 2d 347, 233 P2d 660 (1951)	A158
People -v- Hight, 94 Cal App 2d 100, 210 P2d 270 (1949)	A159
People -v- Johnson, 397 Mich 686 (1976)	A149
People -v- Kimmerle, 90 Cal App 186, 265 P 525 (1928)	A157
People -v- Novo, 12 Cal App 2d 525, 55 P2d 915, reh den 12 Cal App 2d 529, 56 P2d 560 (1936)	A159
People -v- Powell 50 Cal App 436, 195 P 456 (1920)	A159
People -v- Stanley, 344 Mich 500; 75NW2d 39 (1956)	35
People -v- Tobey, 401 Mich 141(1977)	61
People -v- Tophia, 167 Cal App 2d 39, 334 P2d 133 (1959)	A158
People -v- Walther, 27 Cal App 2d 583, 81 P2d 451 (1938)	A158
Perin -v- Peular, 373 Mich 531(1964)	35

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Smart -vs- The New Hampshire Insurance Company, 148 Mich App 724 (1985).. 66

Smith -vs- State, 38 GA. App 366; 143 SE 927 (1928) A154

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State -vs- Fling, 69 Ariz 94, 210 P2d 221 (1949) A158

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State -vs- O'Neil, 24 Wash 2d 802, 167 P2d 471 (1946) A159

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State Bar -vs- Freid, 388 Mich 711, 715 (1972) 52

Cases [con'd] **Page(s)**

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Strand -vs- C & W.M. Ry Company, 67 Mich 380 (1887) A133

Underwood -vs- McDuffee, 15 Mich 361 (1867) 38

United States -vs- Basurto, 497 F.2d.781 (9th Cir., 1974) 46,47

United States -vs- Boscia, 573 F.2d. 827, 883 (3rd Cir., 1978) 59,60

United States -vs- Bryant, 142 U.S. App DC 132, 138 (1972; 439 F.2d. 642, 648 45

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United States -v- Estepa, 471 F.2d. 1132 (2nd Cir., 1972) 45

United States -v- Hatcher, 680 F.2d.438 (6th Cir., 1982) 60

United States -v- Kaplan, 588 F.2d. 71, 74 (4th Cir., 1978) 60

United States -v- KEOGH, 391 F.2d. 138 (CA2, 1968) 45

United States -v- Luna, 525 F.2d.4 (6th Cir. 1975) 46

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United States -v- Nettles, 570 F.2d.547, 552 (5th Cir., 1978) 60

United States -v- Owens, 580 F.2d.365 (9th Cir., 1978) 47

United States -v- Richmond, 735 F.2d.208 54

United States -v- Samango, 607 F.2d.877 (CA 9th, 1979) 46

Weaver -v- Motor Transit Management Company, 252 Mich 64 (1930) A133

Webb -v- People, 83 Colo 1, 262 P 906 (1927), ovrld Crane -v- People, 91 Colo 21, 11 P2d 567 ..... A158

State of Michigan Constitution of 1963

Mich. Const. Art. 1 §2 20

Mich. Const. Art. 1 §17 20,45

Mich. Const. Art. 6 §1 ..... 19,32, 35

Mich. Const. Art. 6 §5 19,35

United States Constitution

Amendment V. 19,45

Amendment VI. 45

United States Constitution [con'd] **Page(s)**

Amendment XIII. 18

Amendment XIV. 18

Michigan Statutes

MCLA 600.910 20,34

MCLA 600.2146 ..... 21,43, A86-A87

Federal Statutes

28 USC §451 17

28 USC §1257(a) 17

28 USC §2101(c) 17

28 USC §2403(b) 17

42 USC §1981 18

42 USC §1983 18

Michigan Court Rules ["MCR"]

MCR 2.203(B) 21,59 A88

MCR 2.312 ..... 21,A88 A120

MCR 2.504(B)(2) 21,A90-91 A133

MCR 2.505(A) 21,59, A90

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MCR 7.210(I)-(J) 21,A90-91 A148

MCR 7.215(F) 21,A91

MCR 8.121(B) 21,A92-93

MCR 8.303 ..... 21,A93-94

MCR 9.110(D) 21,30,55, 61,62,A122

MCR 9.111 ..... 21,23,50, 52,54,62 63,A115

MCR 9.114 ..... 21,41,42 48

MCR 9.115 ..... 21,24,55 57

MCR 9.126 ..... 21,51, A99-101 A122

Michigan Rules of Professional Conduct ["MRPC"]

MRPC 3.3(a)(1)-(4) 21,44,A102

MRPC 3.4(a)-(b) 21,44,A101

MRPC 3.8(d) 21,44 A102-103

MRPC 8.4(a)-(c) 21,44,A103

Michigan Rules of Evidence ["MRE"]

MRE 103(d) A104,A137

MRE 803(6) 43,A104-A105

Law Reviews & Misc.

1 Corpus Juris, 1124, 1127 59

C.J.S., Courts §222 ..... A147

Cal. Business & Professional Code, §6076 [West 1972] A128

J. Ely, Democracy and Distrust, 131-134 (1980) 40

M. Shoaff, State Disciplinary Enforcement System, Structural Survey (1980) .. 36,37 39

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Report of the Master	26, A26-74
Report of Wayne County Hearing Panel #11	28,58 A14-25 A116
Attorney Discipline Board	29, A4-13

CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

On March 22, 1991, the Michigan Supreme Court entered its Order denying the Petitioner leave to appeal from the final Order of the Attorney Disciplinary Board ["Board"] dated February 28, 1991.

On May 31, 1991 The Michigan Supreme Court entered its Order denying the Petittioner's Motion For Reconsideration of the Order denying leave to appeal.

The statutory provision(s) believed to confer on this Court jurisdiction to review the judgement or decree by Writ of Certiorari is as follows:

28USC §451 [Sup.Ct.R. 29,4(c)][5]

28USC §1257(a)

28USC §2101(c) [Sup.Ct.R. 13.1]

28USC §2403(b) [Sup.Ct.R. 29.4(c)]

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[5] As as was noted in List of All Parties To The Proceeding, supra, note 4 the Attorney General of the state of Michigan is not a party. To the Petitioner's knowledge no Court has certified that the constitutionalty of statute(s) of the state was drawn in question.

42USC §1981

42USC §1983

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED[6]

UNITED STATES CONSTITUTION:

AMENDMENT XIII.

§1. Slavery Abolished

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

AMENDMENT XIV.

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

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[6] In accordance with Sup.Ct.Rule 14.1(f) the pertinent text is set forth in the appendix pursuant to subparagraph 1(k) of Sup.Ct. Rule 14 where necessary

AMENDMENT V.

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATE OF MICHIGAN CONSTITUTION of 1963:

ARTICLE 6 - JUDICIAL BRANCH

§1. Judicial power in court of justice; divisions

Sec. 1. The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

§5. Court rules; distinctions between law and equity; master in chancery

Sec. 1. The Supreme Court shall be general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinction between law and equity pro-

ceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited.

ARTICLE 1 - DECLARATION OF RIGHTS

§2. Equal protection; discrimination

Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

§17. Self-incrimination; due process of law; fair treatment at investigations

Sec. 17. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

MICHIGAN STATUTES:

600.910 Admission to bar; discipline; venue [MCLA]

Sec. 910. The supreme court and each circuit court has jurisdiction to admit to the bar of this state, persons who possess the required qualifications, to disbar or suspend members of the bar for misconduct, and to reinstate licenses to practice law. All such matters and proceedings are declared to be civil in nature, and the venue thereof is subject to regulation by the supreme court. P.A.

1961, No.236, §910, Eff.Jan.1, 1963.

MCLA 600.2146

MICHIGAN RULES OF PROFESSIONAL CONDUCT ["MRPC"]

MRPC 3.3(a)(1)-(4)
MRPC 3.4(a)-(b)
MRPC 3.8(d)
MRPC 8.4(a)-(c)

MICHIGAN COURT RULES ["MCR"]

MCR 2.203(B)
MCR 2.312
MCR 2.504(B)(2)
MCR 2.505(A)
MCR 2.505(B)

MCR 7.210(I)-(J)
MCR 7.215(F)

MCR 9.110(D)
MCR 9.111
MCR 9.114
MCR 9.115
MCR 9.126

MCR 8.121(B)
MCR 8.303[7]

CONCISE STATEMENT OF MATERIAL FACTS TO CONSIDERATION OF QUESTIONS PRESENTED

On February 17, 1988, Michael Alan Schwartz, Grievance Administrator, State of Michigan Attorney Grievance Commission [hereinafter "Respondent"] filed a Formal Complaint against Fletcher J. Campbell (P11544) [herein-

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[7] MCR 8.303 effective March 1, 1985 replaced and is based on PCR 908.3 and now requires approval of attorney fees even when the affected parties have consented.

after "Petitioner"] containing six counts.[8] Petitioner on March 16, 1988 filed his Answer To Formal Complaint, together with his Affirmative Defenses and Demand For Reply.

The hearing on Formal Complaint No. ADB 25-88 was scheduled to commence on April 7, 1988 at 9:30 A.M. before the Wayne County Hearing Panel #21 consisting of three (3) attorneys . This April 7, 1988 scheduled hearing was not held because the Respondent, seven (7) days after commencing the first Formal Complaint, filed a Motion To Adjourn on February 24, 1988, which was objected to by the Petitioner, and a new date set for April 29, 1988 before Panel #21.

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[8] Count I alleges misconduct in violation of MCR 9.104(1)-(4) and DR 1-102(A)(1)(5)(6); DR 6-101(A)(3); and DR 7-101(A)(1)-(3), while Count II alleges violation of MCR 9.104(1)-(4) and DR 1-102(A)(1)(4)-(6); DR 2.106(A) and (B). In Count III, the Respondent alleged violation of MCR 9.104 (1)-(4); and DR 1-102(A) (1)(5)(6), and DR 7-106(A), while Count IV alleges violation of MCR 9.104(1)-(4) and DR 1-102(A)(1)(4)-(6). Count IV(sic) alleges violation of MCR 9.104(1)-(4) and DR 1-102(A)(1)(4)-(6), while Count VI alleged violation of MCR 9.104(1)-(4) and DR 1-102(A)(4)-(6).

On April 15, 1988 Petitioner filed a Motion For Summary Disposition And/Or Dismissal of Formal Complaint ADB 25-88 because a "public hearing" was not held within the prescribed 56 days on this Formal Complaint as was/is mandated under Michigan Court Rule 9.111(B) (App.96-97; Powers and Duties).[9] The "public hearing" scheduled for April 29, 1988 was not held by the Attorney Discipline Board [hereinafter "Board"] as previously scheduled.

On May 25, 1988, Respondent filed another Formal Complaint against the Petitioner arising out of a separate occurrence, transaction and event. This latter Complaint was a three (3) count complaint designated ADB

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[9] "App." refers to the Appendix filed in accordance with the Rules of the Supreme Court of the United States ["Sup.Ct.R."], Rule, 14.1(f), 14.1(h) and/or 14.1(k)(v); the first numeral thereafter refers to the numercial order/arrangement of appendices.

133-88[10]

Less than one (1) day later, May 26, 1988 at 10:02 A.M., an Administrative Order/ Letter issued consolidating ADB 25-88 and ADB 133-88 under the signature of the Board's Secretary/Clerk, together with Formal Complaint ADB 133-88 and Consolidation Notice of Hearing setting hearing on both Complaints for July 13, 1988 before new Panel #11 members.

On July 11, 1988, pursuant with Petitioner's discovery demand in accordance with MCR 9.115(F)(4), the Respondent, at its office, disclosed certain documents that they intended to use at the hearing on ADB 133-88 and copies of same were made and provided by Respondent to Petitioner which included Exhibit No. 78

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[10] Count I alleges misconduct in violation of MCR 9.104(1)-(4) and DR 1-102(A)(1)(3)-(6); DR 9-102(A); and DR 9-102(B)(4), while Count II alleges violation of MCR 9.104(1)-(4) and DR 1-102(A) (4)-(6). In Count III, the Commission alleges violation of MCR 9.104(1)-(4)(6) and DR 1-102 (A)(1)(4)-(6).

["Ex"][11].

Prior to the convened July 13, 1988 scheduled hearing before Panel #11 certain dispositive motions were made by both parties in each case.

On July 13, 1988 the parties were heard on various motions. On September 7, 1988 further arguments on motions were had.

On October 27, 1988 Panel #11 issued its Order Granting Request For Admission to Respondent, and denied Petitioner's Motion To Strike Request. As a part of this latter Order each of the motions for Summary Disposition filed by each of the parties were taken under advisement for decision by Panel #11.

On December 23, 1988 an Order appointing a Master was entered by the Board, and served upon the parties.

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[11] "Ex" where used refers to Exhibits which make up the records in this cause introduced by the parties and used by the Master and Panel #11; the first numeral thereafter refers to the number of the exhibit, the latter the transcript page.

On January 31, 1989 Petitioner filed a Motion For Relief From Order Appointing Master. The Board issued its Order Staying Proceedings pending further consideration of the latter motion. Subsequently the Board issued its Order denying the Petitioner's relief requested, and set the matter down for further proceedings on May 8, 1989 before Master Kaplan.

On May 8, 1989 the appointed Master, Steven M. Kaplan, an Assistant Prosecuting Attorney for the county of Macomb, state of Michigan, proceeded to hear the testimony of the witnesses, which was spread over five (5) days and was concluded on July 24, 1989.

On November 10, 1989 the Report Of The Master was docketed with the Board (App.26-74; Report Of The Master), and mailed to Petitioner and Respondent the same day.

Essentially the Report Of The Master sets forth Findings Of Fact and Conclusions Of Law with respect to each separate count contained in each Formal Complaint. Moreover, under Form

Complaint Number ADB 25-88, being a six (6) count complaint the Master as a matter of law concluded as follows:

> "[Petitioner] committed professional misconduct in the following ways:
>
> 1. By collecting a $600.00 non-refundable retainer fee without obtaining either the approval of the Probate Court or the affected parties (as required by Probate Court Rule 908.3), in violation of DR 2-106(A), and (B), and MCR 9.104 (1-4).
>
> 2. By charging and, without having the approval of the Probate Court or the affected parties (as required by PCR 908.3), collecting a clearly excessive fee; a one-third contingency fee, in violation of DR 2-106(A) and (B), and MCR 9.104(1-4).
>
> 3. By violating an Order and Opinion of the Michigan Court of Appeals which directed him to take steps to reimburse the Irwin Estate for excessive fees that he received, in violation of DR 7-106 (A), DR 1-102(A)(5), and MCR 9.104(1-4).
>
> 4. By knowingly violating an Order of the Wayne County Probate Court, dated February 1, 1985, which enjoined him from transferring or spending funds that he received through the Irwin Estate, in violation of DR 7-106(A), DR 1-102(A)(5), and MCR 9.104 (1-4)."

Under Formal Complaint ADB 133-88, being a three (3) count complaint the Master as a matter of law concluded as follows:

> "[Petitioner] committed professional

misconduct in the following ways:

1. By failing or neglecting to deposit the funds of a client, Shirley Wright, which he obtained through the collection of a judgment, in an identifiable bank account, in violation of DR 9-102(A), DR 1-102(A) (4-5), and MCR 9.102 (1-4).

2. By misappropriating the funds of a client, Shirley Wright,, in violation of DR 9-102(A), DR 1-102(A) (4-5), and MCR 9.102(1-4).

3. By knowingly providing false information to a Volunteer Investigator assigned by the Attorney Grievance Commission to investigate a grievance filed against Respondent, in violation of DR 1-102(A)(4-5) and MCR 9.103(3)(4)(6)."

On March 1, 1990 Wayne County Hearing Panel #11 filed its Report (App.14-25; Report of Wayne County Hearing Panel #11), and entered its Order (App.81-85; Order Of Revocation) arising out of its continuing, joint and simultaneous exercise of power and jurisdiction over these proceedings together with the Master.

The Petitioner herein sought timely review of Panel #11's Order of Revocation with the Board and also petitioned for a stay of the Order of Revocation. The Board by its Order granted a stay.

On October 25, 1990 the Board, on review, entered its Order reducing discipline (App.79-80; Order Reducing Discipline), together with its Opinion (App.4-13; Board Opinion).

Essentially the Board concluded that a reduction to a suspension of three (3) years was warranted, but held that it was not persuaded that any phase of the proceedings had been compromised because of the constitutional or procedural defects in that such defects do not constitute "prejudicial irregularity" or "an error resulting in a miscarriage of justice". (Opinion, p.2, para.2)

On November 12, 1990 the Petitioner filed his Motion For Reconsideration and sought a stay pending decision on the request for reconsideration by the Board. On November 15, 1990 the Board entered its order granting the stay of discipline.

On February 28, 1991 the Board entered its supplement to Order denying Motion For Reconsideration (App.77-78; Supplement Order). Since the Board's decision is absolutely

final[12] and the only way to seek review is through a Leave To Appeal to the Michigan Supreme Court, Petitioner on March 14, 1991 timely sought such Leave To Appeal. Since Leave To Appeal was not granted (App.76; Order of Michigan Supreme Court [03-22-91]), the Michigan Supreme Court never heard the case, and the three (3) year discipline imposed was final without judicial intervention.

Petitioner on April 12, 1991 timely filed his Motion For Reconsideration Of The Order Denying Leave To Appeal. On May 31, 1991, the Michigan Supreme Court entered its Order denying reconsideration (App.75; Order of Michigan Supreme Court [05-31-91]), and refused judicial intervention thus rendering the decision of the Board as final.[13]

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[12] MCR 9.110(D)(4)-(6) (App.94-96)

[13] Any other summary, pertinent quotation of record, etc. required by Sup.Ct.R. 14.1(h), given that review is being sought of a judgment of a State Court, is set forth in Appendix evidencing that the federal question(s) were timely and properly raised. See, also Sup.Ct.R. 14.1(k)

Petitioner seeks review on Certiorari to this Honorable Court timely.

DIRECT AND CONCISE ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

The Attorney Discipline Board ["Board"] in reaching its final decision without judicial intervention by the Michigan Supreme Court indicated that "(t)he Board is not persuaded that any phase of these proceedings have been compromised by a prejudicial irregularity or an error resulting in a miscarriage of justice". The Board "liberally construed" the constitutions, statutes, court rules and case-law with respect to the procedural defects of constitutional proportions that existed on whole record, including the exercise of power that exceeded the scope of the Board's authority. Of course, since the Michigan Supreme Court did not hear the case, the improvident actions of the Master, Panel #11 or the Board was placed beyond reproach and judicial intervention even though the Michigan Supreme Court had the exclusive constitutional responsibil-

ity to supervise and discipline Michigan attorneys. Simply stated, there was absolutely no judicial intervention because the Michigan Supreme Court delegated its judicial powers to the Board which is totally autonomous and independent, and this Michigan scheme is actively in conflict with the state constitution itself. Michigan Constitution Article 6 §1. The United States Supreme Court expressly stated that the right of an attorney to practice law is one of which he may be deprived only by judgement of the Court. Garland, 71 U.S. at 371 [decided on the basis of an act of Congress regulating attorneys] This right is given to the attorney by a solemn judicial act of the Court. In re Integration of Nebraska State Bar Association, 133 Neb 283; 275 NW265, 267 (1937), quoted in In re Integration of the State Bar of Oklahoma, 85 Okla 505, ___; 95 P 2d 113, 114 (1939) In the Nebraska decision, the Court stated that "agencies" may be utilized in disbarment proceedings for fact-finding purposes and for

preparing recommendations, as long as they have no power of final decision. 133 Neb at 287, 275 NW at 268. The scheme of attorney discipline was reviewed by the United States Supreme Court in Middlesex County Ethics Committee -vs- Garden State Bar Association, 102 S. Ct.2515 (1982). Unlike the Michigan Supreme Court, the New Jersey Supreme Court makes the final decision on discipline.

Although, as far back as medieval times, attorneys have faced the threat of being completely stripped of the ability to engage in the practice of law [In 1292, the King of England gave the judiciary the power to disbar attorneys. In re Day, 181 Ill 73; 54 NE646 (1899)], and may be justified, it is ironic that the person who takes an oath to uphold the law and the constitution could be the same person who is denied, as in the instant case, the constitutional protection of a judicial hearing in the disciplinary proceeding instituted against them. The power to disbar is uniformly vested in the highest Court of each

state, as is the power to grant a license. Because the authority to discipline attorneys lies within the powers of the state Courts, attorney discipline is an exercise of judicial power. This presumption is crucial in determining whether the delegation of the power to disbar sustains the unconstitutional delegation of judicial power. The Michigan scheme of attorney discipline, in which the Michigan Supreme Court delegates its disciplinary authority to the Attorney Discipline Board for final decision, unavoidably raises the important and pressing issue of unconstitutional delegation of authority under the Michigan Constitution and the United States Constitution.

Moreover, the powers to admit attorneys to the bar, to suspend them, to disbar them, and to reinstate their licenses [Mich Comp Laws Ann §600.910 (West 1981)] constitute purely judicial functions of the Court. While it is true that the Respondent may contend that the scheme vesting attorney discipline in

the Michigan Supreme Court is based on strong legal foundations [e.g. People -vs- Stanley, 344 Mich 500; 75NW2d39 (1956); In re Emmons, 330 Mich 303; 47NW 2d620 (1951); In re Salzbury, 217 Mich 260; 47NW404 (1922)], and in its constitutional power to promulgate Court rules in the discharge of its obligations [e.g. Mich.Court. Art.6, §5; Perin -vs- Peular, 373 Mich 531; 130 NW2d4(1964)(Supreme Court has exclusive power to enact judicial rules of practice and procedure)], it is also true that those same foundations limit the Michigan Supreme Court's authority to delegate its exclusive disciplinary power to the Attorney Discipline Board, a non-judicial body. The Michigan scheme is actively in conflict with the state constitution, Mich.Const.Art.6 §1 (emphasis added) which provides:

> The judicial power of the state is vested exclusively in one court of justice, which **shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court and court of limited jurisdiction**, that the legislature may establish by two-thirds

vote of the membership elected to and serving in each house.

The New Jersey Constitution, unlike the Michigan Constitution, expressly gives to the New Jersey Supreme Court the administration of discipline of attorneys. See, N.J.Const., Art.VI. §2 The location of the power to make the final decision is the main difference between the New Jersey scheme of discipline recently reviewed by the Unites States Supreme Court in Middlesex County Ethics Committee -vs- Garden State Bar Association, supra. This difference, and the fact that under Michigan's system the Board may disbar the attorney, places Michigan in the minority. Only six (6) states allow the judgement on disbarment to be delegated by the state Supreme Court to the hearing committee or disciplinary board [i.e. these states are: Alabama, Michigan, Mississippi, North Carolina, Virginia and Wisconsin (as of 1980). M. Shoaf, State Disciplinary Enforcement System, Structural Survey (1980) [Comparison of attorney disci-

pline proceedings in the fifty states).]

As this Honorable Court mandated in Middlesex County Ethics Committee, 102 S.Ct. 2515 (1982), Petitioner herein has pointedly raised the constitutional challenge in the state proceeding, and, therefore, this Honorable Court ought **not** further abstain from adjudicating questions of attorney discipline and the Writ of Certiorari should be allowed.

Further, in In re Summers, 325 U.S.561 (1945), the United States Supreme Court stated that even though the proceedings to admit an attorney to the bar are declared non-judicial, the actual act of admission or the act of revocation of the license was declared an exercise of judicial power, "a judgement", and a "ministerial act which is performed by virtue of the judicial power".[14] On the basis of its

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[14] In Summers the Supreme Court reviewed Illinois state law. This opinion, however, was accepted as applicable to all jurisdictions in Doe -vs- Pringle, 550 F.2d 596 (10th Cir. 1976). Since the power to disbar is an implication of the power to admit to the bar, both of these functions are of the same type, and In re Summers is applicable to the discussion of disbarment.

own hearing, the Attorney Discipline Board exercises its determination, which is the final judgement in disciplinary proceedings. This disbarment judgement of the Board is therefore an exercise of judicial power. The Michigan position on this issue [See, Underwood -vs- McDuffee, 15 Mich 361 (1867)] was no different under the rule of Saier [293 F.2d at 756], in which the disbarment was declared a judicial function of the Supreme Court. There is absolutely no constitutional provision which sustains an exception to the nondelegability of judicial power under Chandler -vs- Nash, 5 Mich 409 (1858). Obviously, the Michigan Supreme Court did not grant leave to appeal to the Petitioner herein or hear the matter, because the Court was reluctant to invalidate its own Court rules or decisions on constitutional grounds. It, i.e. Michigan Supreme Court, simply chose to look the other way. This duty to discipline was found to be nondelegable to committees or representatives

in many states.[15] It is to be noted that among the six (6) states which allow an agency to render the final decision on disbarment [See, M.Shoaf, supra, pp. 4-5] **only** Michigan and North Carolina do **not** grant the aggrieved attorney any possibility of appeal to the Court as a matter of right. The appeal by leave system of review does not come close to fulfilling the role of a Supreme Court's final decision required by the Michigan Constitution in disbarment proceedings. The operation of the Michigan Attorney Discipline Board is manifestly unconstitutional and allowance of Writ of Certiorari should issue from this Honorable Court to remedy the situation concerning the state action of a proscribed nature. There needs to be adherence to the nondelegation doctrine. As a matter of fact,

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15 In re Integration of Nebraska State Bar Association, 133 Neb 283; 275 NW265, 267 (1937), quoted in In re Integration of the State Bar of Oklahoma, 85 Okla 505, _____; 95P2d 113, 114 (1939) Both opinions emphasize the meaning of the final decision in disbarment for the issue of delegation of judicial power and its constitutionality.

as recent as 1980 Justice Rehnquist of this Honorable Court has sought to breathe life into the nondelegation doctrine. E.g., Industrial Union Department -vs- American Petroleum Institute, 448 U.S.607, 673-676; 100 S.Ct. 2844, 2879-2881; 65 L.Ed.2d 1010 (1980) (Rehnquist, J., concurring in judgement) The foundation of the doctrine, as many have demonstrated [e.g. J. Ely, Democracy and Distrust: A Theory of Judicial Review, 131-134 (1980)], is very sound. The Michigan Supreme Court ought not be permitted to duck its responsibility for judicial intervention in disciplinary proceedings while acting under the color of law.

Aside from the above-stated argument for allowance of Writ of Certiorari within the context of the unconstitutional delegation of judicial power to the Board in these proceedings by the Michigan Supreme Court, certain constitutionally independent and/ or subsidiary arguments are hereinafter made seriatim for allowance of Writ of Certiorari.

First, the Respondent's tampering with, alteration and changing of a document, i.e. Ex 78-1213 (Tr.1208), secured by the Respondent-prosecution secretly during Pre-Formal Complaint stage under the sponsorship and authority of MCR 9.114(C)(1), constitute conduct violative of the due process clause of the Fourteenth Amendment of the United States Constitution or alternatively constitutes conduct which should have caused a dismissal of the Formal Complaint under the inherent supervisory powers of the Court to deter such future acts by the Respondent-prosecutor's and cause them to act with due regard for the integrity of the administration of justice.

During the testimony of Respondent's witness, Mary H. Sanders, it was brought to the attention of the Master that a document secured by the Respondent during the Pre-Formal Complaint stage from Mary H. Sanders' employer National Bank of Detroit, had been altered, deleted and changed intentionally by the Respondent and introduced into evidence.

(Tr. 1207 thru 1211)

It should be noted that this document (i.e. Ex.78-1213) (Tr.1208) was secretly secured by the Respondent, without notice or knowledge of the Petitioner under the sponsorship of MCR 9.114 (C)(1) during the Pre-Formal Complaint stage by a subpoena issued to National Bank of Detroit for the production of their business records covering on the Petitioner and those corporate banking accounts he had with the bank. The subpoena practice utilized by the Administrator, Respondent and its Prosecutors have been permitted by the Michigan Supreme Court heretofore. See, Anonymous -vs- Attorney Grievance Commission, 430 Mich 241; 422 NW2d 648 (1988) However, Petitioner hastens to add that though such practice has been upheld by the Michigan Supreme Court during the Pre-Formal Complaint stage, nevertheless such allowance ought not be viewed as a license, grant or permission for the Respondent-subpoenaor receiving such secret documents to subsequently alter, delete

or change the business records produced, and then offer the same intentionally into evidence as substantive evidence well knowing that the same has been in fact altered, tampered with and changed to provide an advantage to the Respondent.

Moreover, the subpoenaed records of National Bank of Detroit while possibly admissible at trial under MCLA 600.2146, MRE 803 (6), it still does not provide a vehicle to permit the prosecution to legally alter, change, modify or delete certain information provided, and then place it into evidence in its tampered with or altered form. Pure and simple, this action constitute an abuse of the Pre-Formal Complaint subpoena power. Thus, since the Michigan Supreme Court has opined that pre-complaint subpoenas are available under Anonymous, supra, any abuse of such subpoena power is subject the Fourteenth Amendment's due process clause of the United States Constitution or the inherent supervisory power of this Honorable Court.

The Respondent's actions, in tampering with, altering or concealing such document from the Master, in and of itself, constitutes a clear violation of the Michigan Rules of Professional Conduct ["MRPC"] Rules, 3.4(a)-(b); 3.3(a)(1)-(4); 3.8(d) and 8.4 (a)-(c).[16]

Such action, in presenting altered subpoenaed evidence to the Court, should require dismissal of the charges against the Petitioner, or at least a new trial, for prosecutorial misconduct in suppressing the evidence secured secretly and without notice during the Pre-Formal Complaint.

Petitioner hastens to call the Court's attention to another aspect of the judicial system that is being forgotten in reference to such proscribed use. Where such deceitful conduct is undertaken by the prosecutors it makes a mockery of the judicial process. Flagrant prosecutorial conduct requires less of a showing of prejudice by the Defendant.

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[16] Rules Adopted Effective October 1, 1988.

United States -vs- Bryant, 142 U.S. App DC 132, 138 (1971); 439 F.2d.642, 648.

Hence, even under variable standards being used to determine "intentional suppression", where the prosecution has deliberately suppressed evidence which is favorable to the defense, prejudice will be presumed. United States -vs- KEOGH, 391 F.2d.138 (CA2, 1968).

In United States -vs- Estepa, 471 F.2d. 1137 (2nd Cir., 1972), the Second Circuit not only reversed a Defendant's conviction, but expressly gave instructions to the District dismiss the indictment, because the Grand Jury had been misled. It is submitted that, in the case at bar, the course followed by the prosecutor makes a mockery of the United States Constitution; Amendments V and VI and the Michigan Constitution (1963), Article I. §§17 and 20.

What we have in the case at bar is a clear case of a need to deter prosecutorial misconduct and safeguard the judicial process. Moreover, intent to deceive the Court author-

izes the invalidation of a prosecution. United States -vs- Luna, 525 F.2d.4. (6th Cir. 1975), Cert.Den 424 U.S. 965 (1976).

Federal Appeal Courts have affirmed District Courts' dismissal of indictments where Courts have concluded that the prosecution's conduct has placed in jeopardy the integrity of the criminal justice system, even where no perjury has been alleged, but the Court believed that the prosecutor's behavior has exceeded the limits of acceptability. United States -vs- Samango, 607 F.2d at 884, (9th Cir., 1979).

Here in the case at bar, the prosecutor's acts in altering and subsequently seeking to suppress the evidence given to it by a witness secretly under MCR 9.114(C)(1) has failed to comport with "fastidious regard for the honor of the administration of justice" as quoted in Communist Party -vs- Subversive Activities Control Board, 351 U.S. 115 (1956).

As Judge Hufstedler wrote in her concurring opinion in United States -vs- Basurto,

497 F.2d.781, (9th Cir., 1974):

> "An important function of our supervisory power is to guarantee that Federal prosecutors act with due regard for the integrity of the administration of justice." 497 F.2d at 793.

The power of the Court to dismiss an indictment for prosecutorial misconduct, on the basis of its supervisory powers was reaffirmed in United States -vs- Owens, 580 F.2d.365 (9th Cir., 1978):

> "Under its inherent supervisory powers, a Federal Court is empowered to dismiss an indictment on the basis of governmental misconduct... As such, dismissal is used as a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature." 580 F.2d at 367.

Second, the Petitioner was denied a fair trial where the Respondent, without excising documentary evidence as ordered by the Master, caused clearly hearsay evidence to be entered in the trial and record over the objection of the Petitioner. Such unexcised evidence reasonably affected the judgement of the Master, Panel #11 and the Board.

In connection with another pre-complaint

undertaking by the Respondent and its Prosecutor, a Mr. Ronald Karp, Esq. was told by the Respondent to investigate the Request For Investigation filed by Mrs. Shirley Wright in accordance with MCR 9.114(A) (Tr.961). As a part of Mr. Karp's investigation he compiled a "report" and gave it to the Respondent and its Prosecutors. No copy was provided to the Petitioner during this pre-complaint stage, nor was the same available to the public. MCR 9.126(A) (Tr.963)(Ex. 56-963)

During the prosecution of Petitioner, on July 10, 1989, Respondent had attempted to introduce into evidence the Report Mr. Karp testified that he submitted to the Respondent on July 13, 1987. (Tr.963, 965) Petitioner vehemently objected to the admissibility of proposed Exhibit "56", save though statements purportedly made by the Petitioner to the Respondent's investigator, Mr. Karp. (Tr.965, 966)

Mr. Karp merely testified as to what was told to him by Petitioner at one meeting. He

never testified that he was misled in any fashion. Likewise the Respondent presented no other person from the Grievance Commission to testify that they were fraudulently "induced" to do anything by the statements of Petitioner one way or the other in connection with the Grievance Commission's actions in session or out. (Tr.960-992)

The Respondent did not obey the ruling on Exhibit "56", but instead failed and refused to excise the hearsay, and then proceeded to place the whole of Exhibit "56" in the record without excision which included totally hearsay comments "made by other people". The whole of the report, placed in the record contrary to the Master's Order, was read by the Master, Panel #11 and the Board in reaching its decision, and did or may have reasonably contributed to their adverse decision in this matter.

The inclusion in the record of the hearsay and extra judicial statements of others such as Mrs. Wright and Mr. Taylor, inter

alia, voids the misconduct finding in this action [i.e. #133-88] irrespective of the good faith or bad faith of the prosecution in that such action by the Respondent violated not only the rules of evidence, but also the due process clause of the Fourteenth Amendment of the United States Constitution.

Third, the Order of discipline should have been vacated on Formal Complaint ADB 25-88 to ensure due process itself where (1) the Panel did not "hold a public hearing" on the Formal Complaint within fifty-six (56) days, and (2) the fifty-six (56) day rule cannot be disregarded by a Panel or Board as being considered a "goal" only.

Moreover, MCR 9.111(B), in its pertinent part, explicitly states:

> "**(B) Powers and Duties.** A hearing panel shall do the following:
>
> (1) Hold a public hearing on a complaint.... assigned to it within 56 days after the date the complaint is filed with the board ..." [Emphasis Added]

Put simply, the Panel herein did not hold a "public hearing" on the Complaint within

fifty-six (56) days as required. The rule, if it is to have any validity or any force and effect, must be complied with to satisfy due process itself.

Further, the use of the word "shall" in the rule makes it mandatory. To hold otherwise will result in a miscarriage of justice and would be prejudicial to the Petitioner.

Petitioner's Motion For Dismissal was filed with the Board and served on each Panel member and Respondent on or about April 16, 1988 after the 56 day period had run.

The threshold issue whether the panel held a public hearing on the complaint within fifty-six (56) days. Petitioner respectfully contends that the panel did not. To reach this conclusion the meaning "hearings" must be examined. Moreover, MCR 9.126 refers to "Open Hearings". To further explain what are "open hearings", sub-rule 9.126(B) is instructive where it pointedly states in part material:

> "**HEARINGS.** Hearings before a hearing panel.... must be open to the public, ..." [Emphasis Supplied] See, MCR 9.126(B)

Hence it is clear that no hearing "open to the public" was held by the panel within fifty-six (56) days of February 17, 1988. Further it is to be noted that MCR 9.111(B)(1) clearly states that the "hearing" contemplated under this operable fifty-six (56) day rule is a "public hearing", as distinct from a private action of a panel which would render such rule meaningless. Put simply, the panel is without authority to disregard the mandate of the fifty-six (56) day rule for to do so denies the Petitioner due process itself. See, similarly, United States -vs- Crane, 776 F.2d. 600 (6th Cir. 1985)

Beyond doubt disciplinary proceedings are quasi-criminal in character although it is not necessary to observe all of the rules of criminal law in such proceedings. See, State Bar -vs- Freid, 388 Mich 711, 715 (1972) citing State Bar -vs- Woll, 387 Mich 154, 161 (1972). Hence due process must be accorded the Petitioner.

Given that these proceedings are quasi-

criminal in nature [In Re Clink, 117 Mich 619 (1898)], and "punishment" of revocation was imposed against the Petitioner as an outgrowth of ADB No. 25-88, it is only fitting that the 56 day Rule not be dealt with lightly. Put another way, these proceedings, as well as the "punishment" imposed by Panel #11, are "severe and highly penal" [Matter of Hamilton Baluss, 28 Mich 507, 508 (1874)], thus many of the safeguards afforded accused criminals contained in the United States Constitution have been made applicable to disbarment proceedings. In Re Ruffalo, 390 U.S. 544; 20 L.Ed.117 (1968)

The Board in its Opinion of October 25, 1990 urged that dismissal is not "automatic". However, Petitioner did not seek "automatic dismissal" but indeed brought a timely motion for relief as required by law. Secondly, the Board took the position that compliance with MCR 9.111(B)(1) "would not be consistent with the goals of these proceedings". [See, Opinion, p.2, para.3] In short, such recitation

translated means that the inclusion of the 56 day rule is meaningless to an attorney-Petitioner, and the Michigan Supreme Court Rule did not mean what it pointedly stated. Further it is to be noted the dismissal of ADB 25-88 did not mean that the dismissal would be with prejudice.[17]

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[17] The Appellate Court held in Crane, supra, citing United States -vs- Richmond, 735 F. 2d.208, that Mr. Crane's conviction should be vacated and remanded to the U.S. District Court in Detroit for determination only of whether the dismissal requested by motion of Crane should be with or without prejudice.

In light of the 6th Circuit disposition of Crane's Speedy Trial Act claim, the appeals court declined to reach Crane's other assignments of error regarding the trial.

It is significant to note that in rendering its decision the appeals Court stated:

"We recognize the difficulty which the Speedy Trial Act creates for district judges and have no desire to make the life of a very able, diligent and effective federal trial judge like Judge Cohn even more difficult. On review we must, however, follow the law, even though in this instance its wisdom may be questionable. Congress has spoken on this issue, and there is no reasonable basis for finding that an exception is applicable. Commendably, Judge Cohn himself forthrightly recognized that the voir dire was an unacceptable method of escaping from the Congressional purpose expressed in the Act."

Fourth, the Petitioner was denied due process and a fair trial because (1) two separate and distinct actions were consolidated by the Secretary/Clerk to the Board, (2) the Panel and Board granted discovery to the Respondent-prosecution unavailable under the rules and exceeded the scope of their authority (3) the Board refused to provide access to the minutes and list of the Board in connection with their actions in selecting and appointing a Master, (4) the Board established a hybrid hearing format of an unprecedential nature wherein simultaneously a panel jointly made findings of fact and conclusions of law contrary to the clear mandates of MCR 9.110(D)(3) and MCR 9.115(G) itself which also denied equal protection of the law, and (5) procedural due process was also denied where the panel assigned never rendered a decision on the Petitioner's dispositive motions taken under advisement in its Order dated October 27, 1988. Dealing with each of the above subsidiary questions seriatim evinces the following correspond-

ingly.

Before a new hearing date was set to replace the April 29, 1988 hearing date previously set by the Board, which the Board on its own adjourned apparently, the Respondent on May 25, 1988 filed another Formal Complaint against the Petitioner which was assigned ADB No. 133-88 [hereinafter "Wright Matter"] that did not arise out of the same transaction and events, nor did each case depend upon substantially the same proofs in any sense. Further the Respondent made no motion to consolidate the matters. Moreover, less than one (1) day after the docketing of the Wright Matter with the Board (i.e. May 25, 1988, 10:30 A.M.), on May 26, 1988 at 10:02 A.M., a letter under the signature of the Board's Secretary/Clerk and Consolidation Notice of Hearing was received by the Petitioner. Both Formal Complaints was set for hearing on July 13, 1988.

First, in addressing this issue, there must be some due consideration as to what is the nature of these proceedings where a person

is being challenged as to his right to continue to pursue his professional life as an attorney in Michigan. In looking to Chapter 9, Professional Disciplinary Proceedings, Subchapter 9.100 et seq., for guidance MCR 9.115 (A) states, in part material, as follows:

> "(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel."

The Board's action in consolidating these two separate proceedings resulted in the merging of two actions into one, and was not limited to an Order directing they be tried together. Support for the latter contention is apparent since the cases did not arise out of the same transaction nor depended upon substantially the same proofs. Likewise, a reference to the distinction between consolidation of two or more actions, and ordering them tried together is sufficient in and of itself to show the action of the consolidation was improper.

Moreover, in the instant case "consoli-

dation" within the context used in this proceeding is where several actions are combined into one and lose their separate identity and become a single action in which a single adjudication was rendered and discipline imposed by Panel #11 by "stacking". For example, but not without limitation, the loss of the two Formal Complaints' separate identities and their becoming one action is manifested in Report of Wayne County Hearing Panel #11 itself under the section designated as Report On Discipline, pages 3-4, which, in its pertinent part, pointedly states:

> "..., the facts and circumstances in this case lead inescapably to the conclusion that the Petitioner's license to practice law in Michigan should be revoked." [Emphasis Supplied]

Thus, it is obvious and plain by the foregoing quoted passage of Panel #11 that they treated these separate and distinct Formal Complaints as a single action in which a single adjudication was rendered by the inclusion of the words "in this case" in their imposition of discipline of revocation. Put an-

other way, there has been no entry of separate adjudications on each Formal Complaint evidencing that the several actions tried together but each retained its separate character. Consequently, different actions cannot be consolidated unless between the same parties and involving the same subject-matter, issues and defenses. See, 1 Corpus Juris, 1124, 1127; Johnson -vs- Manhatten Ry Co., 289 U.S. 479, 496-497; 77 L.Ed. 1331 (1933)

The standard for consolidation is not quite as broad as the scope of permissive joiner of actions and parties, as a consequence of which there are claims which may be permissively joined which cannot be consolidated if sued upon separately. See, and Compare, MCR 2.505(A) and MCR 2.203(B). Clearly Formal Complaint, ADB No. 133-88 was made the subject of a separate action therefore it cannot be consolidated with the other unrelated action pending between the same parties under MCR 2.505.

In United States -vs- Boscia, 573 F.2d.

827, 883 (3rd Cir., 1978) the Court stated:

> "Of course, no Defendant should ever be deprived of a fair trial because it is easier or more economical for the government to try several Defendants in one trial rather than in protracted multiple trials. The goal of the judicial process is not to decide cases as quickly and as inexpensively as possible." [Emphasis Added]

Further, even if different transactions violate the same substantive code, enactment or Court rule, or include a common Defendant, nevertheless consolidation should be denied. United States -vs- Kaplan, 588 F.2d.71, 74 (4th Cir., 1978); United States -vs- Nettles, 570 F.2d.547, 552 (5th Cir.1978); United States -vs- Martin, F.2d.849, 853 (9th Cir. 1977). This is true even if all counts of the two (2) complaints include a common Defendant. See, also, United States -vs- Hatcher, 680 F.2d.438 (6th Cir., 1982).

It is clear that an accused has the right not to be tried at one time for two separate and distinct offenses arising out of substantially different transactions. This is true even where two different transactions violate

the same statute. People -vs- Donaldson, 65 Mich App 588 (1975)

Put simply, a Judge does not have the discretion to join for trial separate offenses committed at different times. See, and compare, People -vs- Tobey, 401 Mich 141 (1977)

Likewise, Petitioner respectfully contends that MCR 9.110(D)(3) expressly proscribes the practice of appointing both a panel and a master to "receive evidence and make written findings of fact", and the like. See, MCR 9.111(B). Likewise, the statutory or rule-making scheme does not provide for such joint hearing process, i.e. jointly before the Master and at the same time before the Panel. Hence, due process itself is wanting under such procedure prescribed by the Board in its Order Appointing A Master, and denies, also, the Petitioner equal protection of the law.

More specifically MCR 9.110(D)(3), by the use of the word "**or**" therein, and being in the disjunctive, clearly does not evince the power

(i.e. jurisdiction) to "assign" Formal Complaints to both a Panel and a Master at the same time. Moreover, the Board only has jurisdiction (i.e. power) to "assign it to a hearing panel or to a Master". MCR 9.110(D)(3) [Emphasis Added] If the Michigan Supreme Court under its rule-making authority had intended that both a panel and a Master be jointly appointed and assigned, it would have said so. Put simply, if the Michigan Supreme Court wanted or intended that the Board had jurisdiction/power to appoint and assign both "on the filing of a Complaint", it would have used the conjunctive word "and" and not the disjunctive "or" in Rule 9.110(D)(3).

Therefore, once the Board, in the exercise of its power under MCR 9.110(D)(3), had "assigned it (the Complaints) to a hearing panel", coupled with the assigned panel having "receive(d) evidence and (made) findings of fact" under both Rule 9.111(B) and Rule 9.115 (F)-(G), and caused the issuance of various adjudications as an outgrowth, it is clear

error of constitutional proportions for the Board to delegate Panel #11 duties prescribed under Rule 9.111(A) and (B) to a Master while Panel #11 was still in place and making decisions and rulings.

To further amplify the reasons for the allowance of certiorari is the Board in its findings of fact under Count III of the Formal Complaint 133-88 held:

> "1. Ronald Karp, an attorney, was appointed by the Attorney Grievance Commission to serve as a Volunteer Investigator regarding a Grievance filed by Shirley Wright against Petitioner.
>
> 2. As part of his duties, Karp interviewed Petitioner in April of 1987.
>
> 3. Karp prepared a Report embracing his findings, but the document was not introduced as an exhibit at the hearing.[18] [Emphasis Added]
>
> 4. Respondent advised Karp that he retained all of the proceeds derived from the judgement in cash, as Wright's request.

---

[18] This is absolutely not true. See pointedly Prosecution's Exhibit #56 dated July 10, 1989 at page 183 of transcript of the proceedings and record used to impose punishment. Totally hearsay evidence placed in the record without being excised as ordered by the Master.

5. Since Shirley Wright did not testify, it cannot be shown that Petitioner falsely informed Investigator Karp that Wright asked him to hold the funds in cash in order to avoid a garnishment.

6. Respondent falsely reported to Investigator Karp that he held the proceeds derived from the cashier's check of September 16, 1981, in cash. The testimony of Mary Sanders and the exhibits related to the transactions of September 16, 1981, along with other bank exhibits, reveal that Petitioner deposited $6,412.87 of the $7,428.87 in two accounts, receiving the remainder in cash. Subsequent to that transaction, he withdrew all but $198.02 from his trust account. Thus, Petitioner did not keep the proceeds of the garnishment check at his office, as he represented to Karp.

CONCLUSION: Respondent [Petitioner] committed professional misconduct by knowingly providing false information to a Volunteer Investigator of the Attorney Grievance Commission who was investigating a grievance filed against Respondent."

Moreover, the Board in its conclusion of law under Count III of Formal Complaint #133-88 found improvidently that "Respondent [Petitioner] committed professional misconduct in the following manner:

"3. By knowingly providing false information to a Volunteer Investigator assigned by the Attorney Grievance Commission to investigate a grievance filed against Respondent, in violation of DR

1-102(A)(4-5) and MCR 9.103(3)(4)(6).[19]

In sum, the Prosecution failed to prove or sustain a finding of misrepresentation under Count III. Prosecution had to prove each of the six (6) following elements:

> "(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." Hi-Way Motor Company -vs- International Harvester Company, 398 Mich 330; 336; 247 NW2d 813 (1976), quoting Candler -vs- Heigho, 208 Mich 115, 121; 175 NW 141 (1919).

There was absolutely no showing by the Prosecution, through Mr. Karp or otherwise competent and admissible evidence in the record, that the Investigator or the Commis-

---

[19] It must be noted that no MCR 9.103(3)(4)(6) violation was alleged in the Board's Formal Complaint, but nevertheless the Petitioner was found guilty of such rule contrary to the clear due process decision rendered by the United States Supreme Court in The Matter of Ruffalo, Jr., supra. Such rule does not exist.

sion actually relied to their detriment on the statements of Petitioner on the "misrepresentation". See, similarly, Smart -vs- New Hampshire Insurance Company, 148 Mich App 724 (1985)

Lastly, Panel #11 and the Board committed reversible error wherein it mandated revocation and three (3) years suspension respectively of the Petitioner's herein license to practice law because, given the Petitioner's twenty-one (21) years, when compared to similarly situated attorneys, the imposition of the penalty of even three (3) years is cruel and unusual, and not supported by record or prior decisions. Such penalty violates the Michigan and United States Constitutions when applied. The imposition is violative of the Petitioner's due process right and creates disparity in penalties imposed on other attorneys similarly situated.

In the instant case the Board in reducing the imposed punishment of the Petitioner's noted the otherwise unmarred practice of law

for twenty-one (21) years, save a reprimand in 1978 which even Panel #11 found "sufficiently remote in time that it has virtually no aggravating effect". [See, Board's Opinion, October 25, 1990, page 3, para.3]

For example, but without limitation, violation of restraining order of a trial Court enjoining the transfer of property has only resulted in an attorney being reprimanded. See, In The Matter Of Donald E. Bacon, P28933, Reported January 1988, Vol. 67, No. 1 of Michigan Bar Journal. With respect to false statements in a Court proceeding. See, In Re Booker T. Gaulden, P13878, June 1979, Vol. 56, No. 6 [120 days suspension]; In Re William L. Fischel, P22866, June 1989, Vol. 68, No. 6 [Reprimand]; In Re John Devers, Jr., P12716, March 1988, Vol. 67, No.3 [Reprimand]; In Re Melvin Turner, P273336, December 1987, Vol. 66, No. 12 [150 day suspension]; In Re Robert O. Lindow, P16698, December 1985, Vol. 64, No. 12 [75 day suspension]; In Re Robert R. Jacobsen, P15407, October 1985, Vol. 64, No.

10 [121 day suspension]; In Re Michael L. Oesterle, P27189, October 1985, Vol. 64, No. 10 [121 day suspension]; In Re Bary E. Solomon, P20772, March 1979, Vol. 58, No.3 [30 day suspension] With respect to mishandling of client funds. See, Phillip J. Tocco, P21484, November 1982, Vol. 61, No. 11 [60 day suspension]; In Re Mark H. Teklinski, P21319, December 1985, Vol. 64, No. 12 [Reprimand]; In Re Albert A. Chappell, P24900, October 1980, Vol. 59, No. 10 [Reprimand]; In Re Jacob Heffner, P14820, September 1985, Vol. 64, No. 9 [Reprimand]; In Re Kevin J. Henze, P34801, July 1989, Vol. 68, No. 7 [120 day suspension]; In Re Michael E. Thomas, P25798, May 1989, Vol. 68, No. 5 [60 day suspension]. With respect to excessive fees. See, In Re C. Michael Gorte, P14213, November 1982, Vol. 61, No. 11 [Reprimand]; In Re Robert E. Kostin, P16168, July 1989, Vol. 68, No. 7 [Reprimand]; In Re William J. Hayes, P14775, August 1989, Vol. 68, No. 8 [Reprimand]

A three (3) years suspension given the

comparative sampling research above, when coupled with the current punishment being imposed on other attorneys recently evinces the cruel and unusual imposition of penalty leveled against the Petitioner.[20]

In sum, it is respectfully submitted that the Michigan Supreme Court, acting through its established Attorney Discipline Road, has decided federal questions in a manner which conflict with not only other State Courts of last resort, but Federal Court of Appeals as is more in particular set forth above, and as supplemented in Petitioner's Appendix in accordance with Sup.Ct.R.14.1 (h). Likewise, the Michigan Supreme Court has decided important questions of federal law which has not been,

---

[20] Effective June 22, 1991 the Board imposed only a six (6) month suspension against a White attorney Edward N. Rapoport (P26698). Mr. Rapoport not only neglected all six cases he was retained to represent, but also received fees in a Probate case [i.e. estate], without first obtaining Court approval. Mr. Rapoport additionally failed to answer the Formal Complaints and failed to appear at hearing and was defaulted. Costs were assessed at only $319.50.

but should be, settled by this Honorable Court, or has decided federal questions in ways which conflict with applicable decisions of this Honorable Court.

The nature of the disciplinary proceedings have been stated this way:

> "The power [to disbar], however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the rights and dignity of the court itself." [Emphasis Added] [Ex Parte Secombe, 19 How. 9, 13 (1856)

Thus, a citizen who becomes an attorney and enters such public service cannot be forced to sacrifice his civil rights. As was referred in somewhat different factual setting wherein discipline imposed by the state of license to practive law; in concluding that the denial deprived the attorney of due process of law, the Court noted:

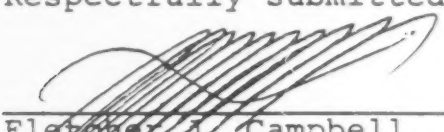
> "We need not enter into a discussion whether the practice of law is a "right" or "privilege". Regardless of how the

> State' grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly, the practice of law is not a matter of the State's grace." 353 U.S. at p.239. [Emphasis Added]

See, Schware -vs- Board of Bar Examiners, 353 U.S. 232 (1957)

For the foregoing reasons, it is urged that the Petition For Writ of Certiorari be allowed.

Respectfully submitted,



Fletcher J. Campbell
Petitioner In Pro Se
3714 W. McNichols Road
Detroit, Michigan 48221
(313) 345-8839

91-483 (2)

Supreme Court, U.S.
FILED
AUG 27 1991
OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FLETCHER J. CAMPBELL,

Petitioner,

vs.

MICHAEL ALLEN SCHWARTZ, Grievance Administrator, State of Michigan Attorney Grievance Commission,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

FLETCHER J. CAMPBELL

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TABLE OF CONTENTS

Page(s)

OPINIONS:

Attorney Discipline Board 4-13

Wayne County Hearing Panel #11 14-25

Report of Master 26-74

ORDERS:

Order of Michigan Supreme Court Denying Reconsideration [5-31-91]. 75

Order of Michigan Supreme Court Denying Leave To Appeal [3-22-91]. 76

Supplement Order of Attorney Discipline Board Denying Reconsideration [2-28-91] 77-78

Order of Attorney Discipline Board Reducing Discipline [10-25-90] ... 79-80

Order of Revocation of Panel #11 [3-01-90] 81-85

STATUTE(S), REGULATIONS & COURT RULES:

Statute(s)

MCLA 600.2146 86-87

Michigan Court Rules ["MCR"]

MCR 2.203(B) 88

Michigan Court Rules ["MCR"] [con'd]	Page(s)
MCR 2.312	88
MCR 2.504(B)(2)	89
MCR 2.505(A)	90
MCR 7.210(I)-(J)	90-91
MCR 7.215(F)	91
MCR 8.121(A)(B)(F)	92-93
MCR 8.303	93-94
MCR 9.110(D)	94-96
MCR 9.111	96-97
MCR 9.114	97
MCR 9.115	97-99
MCR 9.126	99-101

Michigan Rules of Professional Conduct ["MRPC"]

MRPC 3.3(a)(1-4)	102
MRPC 3.4(a)-(b)	101
MRPC 3.8(d)	102-103
MRPC 8.4(a)-(c)	103

Michigan Rules of Evidence:

MRE 103(d)	104,137
MRE 803(6)	104-105

Transaction Receipt [NBD]: **Page(s)**

Exhibit "A" 161

Exhibit "56" 106-114

Additional Specific Material Underlying Federal Questions Raised In State Court [See, Sup.Ct.R. 14.1(h) and (k)]:

Sup.Ct.R. 14.1(h) Voluminous Presentments 115-160

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,
Petitioner/Appellee,

v

Fletcher J Campbell, P 11544,
Respondent/Appellant.

ADB 25-88; 133-88

BOARD OPINION

The respondent has filed a petition in accordance with MCR 9.118 seeking review of a hearing panel Order of Revocation. The hearing panel entered its order following its adoption of the findings and conclusions of a master who received the testimony and evidence submitted by the parties and reported his findings to the panel. The panel ruled that the evidence established that the respondent, in connection with his representation of the conservator of an estate, collected a $600 retainer fee without approval of the Probate Court or the affected parties; charged and collected an excessive contingency fee in a probate case; violated an order of the Michi-

gan Court of Appeals directing him to reimburse the estate for excessive fees; and violated an order of the Wayne County Probate Court enjoining him from transferring or spending funds received from the estate.

In a separate case consolidated for hearing, the panel found that the evidence established that the respondent was retained to prosecute an insurance claim for damages sustained in a fire loss. During the course of that representation, the respondent was found to have failed to deposit client funds in an identifiable bank account; to have misappropriated those funds; and to have knowingly provided false information to an Attorney Grievance Commission investigator.

Based upon its review of the whole record and the arguments of the parties, the Attorney Discipline Board has concluded that the proceedings before the hearing panel and master should not be set aside on the basis of the

irregularities or defects claimed by the respondent. The Board further finds that the findings and conclusions of the panel have ample support in the record and should be affirmed. With regard to the discipline imposed, the Board concludes that reduction to a suspension of three years is warranted.

A six-count formal complaint in case ADB 25-88 was filed by the Grievance Administrator February 17, 1988. A second complaint, ADB 133-88, containing three counts, was filed May 25, 1988. The respondent timely answered both complaints. The matters were consolidated administratively by the Board and assigned to Wayne County Hearing Panel #11.

The various procedural defects alleged by the respondent have each been considered by the Board. The Board is not persuaded that any phase of these proceedings has been compromised by a prejudicial irregularity or an error, resulting in a miscarriage of justice.

See MCR 9.107(A). The Board's considerations of these issues has been conducted in light of MCR 9.102(A) which directs that these rules are to be liberally construed for the protection of the public, the courts and the legal profession.

The Board specifically rejects the respondent's claim that the provision of MCR 9.111(B) that a public hearing on a complaint be held within fifty-six days after the date the complaint is filed is jurisdictional and must be strictly construed to require dismissal if the hearing is not commenced within that period. The Board has previously ruled that automatic dismissal of a complaint under a strict reading of that rule would not be consistent with the goals of these proceedings. Matter of Ronald R. Kubik, DP 186/84, [Brd. Opn. February 2, 1987) citing State Bar Grievance Administrator v Posler, 393 Mich 38 (1974); State Bar Grievance Administrator v

Donigan, 403 Mich 172 (1978).

In this case, the panel acted within its discretion by adjourning the hearing scheduled for April 7, 1988 to April 29, 1988. Review of the record discloses that the hearing was further delayed by the replacement of two hearing panel members following the respondent's April 6, 1988 motion to disqualify panel members Zemmol and Jordan. The Board is unable to conclude that these proceedings have been unduly protracted in light of the volume and complexity of the issues raised by the parties during the course of the proceedings.

The respondent also challenges to the Board's appointment of a master to conduct the evidentiary hearings. The respondent's claim that MCR 9.110(D)(3) must be given the strictest and most literal interpretation was considered by the Board and rejected in its order of February 17, 1989. It has not been shown that that order was entered erroneously. The

Board remains unpersuaded that the decision to appoint a panel or a master can be made only at the time the complaint is filed. Under that rule, assignment of a complaint to a master may made "if it appears that the hearing will be a prolonged one". In actually, it is highly unlikely that the staff members of the Attorney Discipline Board would be able to predict which complaints are likely to result in prolonged proceedings. In this case, the request for the appointment of a master came from the hearing panel after two days of hearings on preliminary matters and consideration of a record which, at that point, included 230 pages of pleadings and a transcript of 200 pages. The appointment of a master is affirmed.

The testimony presented before master Steven Kaplan comprises a transcript of an additional 1100 pages. The Board's review of the record below is guided by the appellate

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standard enunciated by the Supreme Court. The Board's decision is based upon the conclusion that there is proper evidentiary in the whole record for those findings. Grievance Administrator v Crane, 400 Mich 484 (1977); In re DelRio, 407 Mich 336 (1977). The Board has traditionally deferred to a hearing panel's assessment of credibility, Schwartz v Sauer, DP 25.84 (Brd. Opn. P. 359, 1985). In this case, the detailed report of the master includes appropriate references to the evidentiary support for his conclusions and it has not been shown to be erroneous.

Finally, we review the level of discipline imposed in this case. The misconduct which as been established, including misappropriation of client funds and the subsequent misrepresentation that client funds were held in case, falls within that category of misconduct which the Board has found "ranks among the most serious breaches of professional

NOTE:

INATION IS NOT CONTINUOUS.

ethics and seriously undermines public confidence in the legal profession. We have stated that, depending upon several factors, discipline ranging from a suspension from threes years to disbarment would be appropriate for such an offense." Matter of John Hasty, ADB 1-87, Brd. Opn. February 8, 1988; Matter of Douglas E. H. Williams, DP 126/81 (Brd. Opn. p.313, 1984).

The respondent does not enjoy an unblemished disciplinary record, having been reprimanded in 9178. We agree, however, with the conclusion of the panel that the 1978 reprimand is sufficiently remote in time that it has virtually no aggravating effect. In considering the level of discipline, we include as a factor the respondent's otherwise unmarred practice of law in Michigan for twenty-one years.

We have also reviewed the respondent's testimony at the discipline hearing conducted

before the panel together with the pleadings and arguments presented on his behalf in these review proceedings.

Based upon the unique factors presented in this case, we conclude that a suspension of three years is sufficient to achieve the stated goals of these disciplinary proceedings and falls within the range of discipline imposed for similar misconduct in prior cases.

All concur

Member Hanley M. Gurwin did not participate

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

ADB 25-88;133-88

v

Fletcher J. Campbell, P11544

Respondent.

_____/

ATTORNEY DISCIPLINE BOARD

Report of Wayne County Hearing Panel #11

At a session of said hearing panel held at One Kennedy Square, Suite 1910, Detroit, MI on January 18, 1990.

PRESENT: David J. Rosin, Chairman
Arthur J. Tarnow, Member
Dawn A. VanHoek, Member

Appearances: Cynthia C. Charles, Esq. AGC
Thomas L. E. Stanley, Esq.
for respondent

Pleadings

(See List of Pleadings Marked As Attachment 1)

Exhibits

The indexes to exhibits are set forth in Volumes I through VIII of the transcript of these proceedings.

Panel Proceedings

This matter was commenced with the filing of Formal Complaint ADB 25-88 on February 18, 1988. A second case, ADB 133-88 was filed May 25, 1988 and was consolidated for hearing. The first case was originally assigned to Wayne County Hearing Panel #21. Although the respondent's motion to disqualify members of that hearing panel was denied, the voluntary withdrawal of two members of the panel resulted in the Board's Order of reassignment dated May 12, 1988 assigning this matter to Wayne County Hearing Panel #11. A subsequent Notice of Substitution issued by the Board July 6, 1988 resulted in the establishment of the hearing panel which ultimately heard and decided this case consisting of David I. Rosin, Chairman; Arthur J. Tarnow, and Dawn A. Van Hoek.

The panel conducted preliminary hearings in this matter on July 13, 1988 and September 7, 1988 to dispose of the various motions filed by the parties. During the course of those

hearings, it became evident to the members of the panel that scheduling delays in this case could be avoided if the evidentiary hearings on the factual issues presented were conducted by a single factfinder and a written request was made to the Attorney Discipline Board for appointment of a master. The Board's order appointing Steven M. Kaplan to serve as a master was issued December 23, 1988.

The report of the master Steven Kaplan was filed with the Board November 10, 1989 along with Volumes III through VII of the transcript (Pages 201-1368).

The final hearing conducted by the panel was held on January 18, 1990 and was conducted in the nature of a separate hearing on discipline in accordance with MCR 9.115.(J)(2).

Report on Discipline

Hearings conducted by a master are governed by MCR 9.117. In accordance with that rule, the hearing panel has considered the report of master Steven M. Kaplan filed

November 10, 1989. The panel notes that no objections to the master's report were filed by the respondent or the Grievance Administrator within fourteen (14) days as provided in that rule.

The panel has unanimously determined that the record in this case supports the findings of fact and conclusions of law contained in the master's report. The master's report is specifically adopted and made a part of this report. In summary, the panel adopts the panel's findings that the Grievance Administrator filed to establish professional misconduct as alleged in Case ADB 25-88, Count I; the allegation in Count II that the right of Ophelia Mason to retain substitute counsel was impeded by a contingency fee agreement; Count V; Count VI. The remainder of the allegations in Case ADB 25-88, Counts II, III, and IV were established.

With regard to CASE ADB 133-88, the panel adopts the master's findings that the charges

in Count I, paragraph K, and Count were not established. The other allegations of Count I were established.

As set forth in the master's report, the panel adopts the following conclusions of law:

Conclusions of Law -- Case ADB 25-88

Respondent committed professional misconduct in the following ways:

1. By collecting a $600.00 non-refundable retainer fee without obtaining either the approval of the Probate Court or the affected parties (as required by Probate Court Rule 908.3), in violation of DR 2-106(A) and (B), and MCR 9.104 (1-4).

2. By charging and, without having the approval of the Probate Court or the affected parties (as required by Probate Court Rule 908.3), collecting a clearly excessive fee; a one-third contingency fee, in violation of DR 2-106(A) and (B), and MCR 9.104(1-4).

3. By violating an Order and Opinion of the Michigan Court of Appeals which directed him to take steps to reimburse the Irwin Estate for excessive fees that he received, in violation of DR 7-106(A), DR 1-102(A)(5), and MCR 9.104(1-4).

4. By knowingly violating an Order of the Wayne County Probate Court, dated February 1, 1985, which enjoined him from transferring or spending funds that he received through the Irwin Estate, in violation of DR 7-106(A), DR 1-102(A)(5), and MCR 9.104 (1-4).

Conclusions of Law -- Case ADB 133-88

Respondent committed professional misconduct in the following ways:

1. By failing or neglecting to deposit the funds in an identifiable bank account, funds received on behalf of a client, Shirley Wright, through the collection of a judgment, in violation of DR 9-102(A), DR 1-102 (A)(4-5), and MCR

9.102(1-4).

2. By misappropriating the funds of a client, Shirley Wright, in violation of DR 9-102(A), DR 1-102(A) (4-5), and MCR 9.102(1-4).

3. By knowingly providing false information to a volunteer investigator assigned by the Attorney Grievance Commission to investigate a grievance filed against respondent, in violation of DR 1-102(A) (4-5) and MCR 9.103(3,4,6).

Report on Discipline

At the separate hearing on discipline conducted January 18, 1990 the parties were provided an opportunity to present evidence in the nature of aggravation or mitigation which might have a bearing upon the appropriate level of discipline to be imposed.

Counsel for the Grievance Administrator presented two exhibits which were received. Exhibit #85 is copy of an amended order dated August 29, 1989 by Martin T. Maher, Wayne

County Probate Court Judge, directing that the respondent immediately turn over the Estate of Bessie Irwin the amount of $65,179.17 together with interest at the statutory rate. Exhibit #86 is a copy of an order of reprimand issued against the respondent by the State Bar Grievance Board on September 28, 1978.

The respondent was called to stand to testify in his own behalf. The respondent was admitted to the practice of law in Michigan in June 1969. He testified that the contingent fee agreement in the Matter of the Estate of Bessie Irwin was drafted and executed under his belief that such an agreement was neither illegal or unethical. (Tr.p.1396) With regard to the master's findings as to Count III, ADB 25-88, that he disregarded an order of the Michigan Court of Appeals to return excessive fees to the estate, the respondent points out that the master's report refers to the "indirect" order of that Court to return the fees and respondent argues that he has not will-

fully disobeyed the explicit language of that order. (Tr.p.1406) The panel considered the respondent's testimony on these and other points relating to his actions with regard to these matters.

It is the opinion of the panel that the respondent's 1978 reprimand is sufficiently remote in time that it was virtually no aggravating effect. In considering respondent's testimony as mitigation, the panel notes that the Attorney Discipline Board has defined mitigation as circumstances "such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of [respondent's] moral culpability." Matter of Ross John Fazio, DP 105/80, Opn.of Brd. p.146 (1981), citing Louisiana State Bar Association v Sheehan, 338 SO2d, 1347, 1351 (Louisiana 1976).

It is the opinion of the panel that the testimony offered by the respondent does not

tend to mitigate his established misconduct. On the contrary, such testimony tends to support the conclusion that Mr. Campbells is unable to grasp the seriousness of his misconduct or to fully appreciate the nature of his obligations as an officer of the court. The document prepared by the respondent entitled "Power of Attorney and Assignment" (Exhibit #8) giving him a lien on the assets of the estate for a fee equal to one-third (1/3) of the amounts received and giving him a "vested interest" in those amounts was, in our opinion, unconscionable. His continued failure to return the excessive fees to that estate although ordered to do so, constitutes further evidence of the respondent's failure to fulfill his obligations to his former client or to the courts.

The findings and conclusions with regard to ADB 133-88, including findings that the respondent commingled client funds with his own, misappropriated funds of a client and knowing-

ly provided false information during the course of the Grievance Administrator's investigation, constitute acts of misconduct which are sufficiently egregious to warrant substantial discipline. More importantly, those separate acts of misconduct suggests a pattern of misconduct.

Inasmuch as the primary purpose of these proceedings is the protection of the public, the courts and the legal profession, the facts and circumstances in this case lead inescapably to the conclusion that the respondent's license to practice law in Michigan should be revoked.

Prior Discipline

34509-A	Reprimand	9/28/78

Statement of Costs

Attorney Grievance Commission

Mileage	$ 35.02
Telephone	4.05
Postage	6.08
Subpoenas	139.00
Copying (Bank records, Transcripts)	625.83

Travel-air fare (witness)	432.00
total	$1241.98

Attorney Discipline Board

Transcript 7/13/88	$ 485.60
Transcript 9/7/88	232.50
Transcript 5/8/89	842.50
Transcript 6/5/89	881.00
Transcript 6/19/89	694.00
Transcript 7/1/89	751.75
Transcript 7/24/89	600.50
Transcript 1/18/90	250.00
Total	$ 4737.85

Total Amount Due: $5979.83

ATTORNEY DISCIPLINE BOARD
Wayne County Hearing Panel #11

By_____
David I. Rosin, Chairman

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

ADB 25-88;133-88

v

Fletcher J. Campbell, P11544

Respondent.

_____/

REPORT OF THE MASTER

I. Introduction

On February 17, 1988 and May 25, 1988, the Attorney Grievance Commission filed formal complaints against Respondent, Fletcher J. Campbell. The cases were consolidated for hearing before Wayne County Hearing Panel #11. The hearing panel appointed a Master on December 23, 1988. A hearing, spread over five days, was concluded on July 24, 1989.

II. Master's Duties

Under MCR 9.117, the Master is obligated to conduct a hearing, analogous to a non-jury trial. After the hearing, the Master is re-

quired to prepare and file a report with the Attorney Discipline Board, containing a brief statement of the proceedings, findings of fact and conclusions of law.

III. Summary of Petitioner's Complaints

A. Case No. 25-88

The crux of this six-count complaint is that Respondent, as the attorney for the conservator and guardian of Bessie Irwin, charged and collected an excessive fee, made false material statements to the Wayne County Probate Court, and failed to comply with Orders of the Michigan Court of Appeals and the Wayne County Circuit Court in connection with his representation of the conservator and guardian.

B. Case No. 133-88

In this three-count complaint, Petitioner alleged that Respondent, retained by Shirley Wright to represent her in an insurance claim, committed the following acts of misconduct:

1. Misappropriated funds derived from a judgment obtained in favor of Shirley Wright in a jury trial concluded on June 11, 1981;

2. Disobeyed an Order entered in the Wayne County Circuit Court prohibiting him from disposing of proceeds he obtained by way of a writ of garnishment against the insurance company's bank; and

3. Made false, material statements to a volunteer attorney of the Attorney Grievance Commission, who was investigating a complaint filed by Shirley Wright against respondent.

IV. Summary of the Testimony

The complainant in Case Number 25-88, Ophelia Mason, testified that she was a friend and neighbor of Bessie Irwin on Trinity Street in Detroit (Tr.pp.523-524). When Irwin fractured her hip in 1978, Mason, pursuant to a

power of attorney vested in her by Irwin, admitted that elderly lady into a hospital (Tr, p.525). From 1978 through 1983, Mason paid Irwin's bills and maintained her home by using Irwin's savings, dividends, and social security checks (Tr, p 529). Mason desired to be appointed Irwin's guardian (Tr, p 529).

On September 15, 1983, Mason and Respondent entered into an agreement (Exhibit 1), whereby she would pay him a $600.00 non-refundable retainer fee. In addition to the retainer fee, Mason was obligated to pay the attorney $350.00 per court appearance and reimburse him for costs. Respondent was required to represent Mason in her petition to be appointed conservator and guardian of Irwin's Estate.

In the petition for appointment as guardian, Mason listed the following assets: $4500 in real property; $400 in person property; and $858 in monthly income (Exhibit 5). The exhi-

bit shows that Irwin had three relatives, two nieces and a nephew. Irwin also owned bonds and stocks, but Respondent told Mason not to mention those assets while testifying in the Probate Court on the conservatorship petition (Tr, P 536). The Probate Judge did not specifically inquire about stocks and bonds owned by Irwin, and Mason did not volunteer the information (Tr, p. 536).

On June 26, 1984, Mason, as conservator of Irwin's Estate, assigned various rights to Respondent by way of a "power of attorney and assignment" document. Mason stated that she signed the document at the request of Respondent. The second paragraph of the document (Exhibit 7) provides:

> "I irrevocably appoint my attorney Fletcher J. Campbell, or his designee, my attorney-in-fact in the premises, to all acts, matters and things deemed necessary to desirable by any such authorized person, with full power and authority in my name, or that of the estate for the sole benefit of FLETCHER J. CAMPBELL to sue for, or compromise and to recover

> and receive all or part of the acquired lien granted by this assignment to secure his attorney fee and/or expenses, which said amount is equal to thirty--three and one third (33 1/3%) percent of any amounts realized through compromise, suit, judgments, administrative awards, entitlements, and demands."

After Mason was appointed conservator of the Estate and after she vested Respondent with the power of attorney and assignment, she appeared at Irwin's bank along with the niece of Irwin (Tr. p 540). The contents of a safety deposit box, including jewelry, bonds, and stock certificates, were given to Mason (Tr, pp 541-544). Mason thereupon met with Respondent at his law office to review the recently discovered assets of Irwin (Tr.p 541). When Respondent examined the assets, he exclaimed, "wow, these are worth a lot of money." (Tr. p 542).

In December of 1984, Mason, while accompanied by and at the recommendation of Respondent, sold the stocks and bonds (Tr, pp 544,

545, 547). Mason placed the proceeds of the sale, which she estimated to be in excess of $200,000, into a checking account at Comerica Bank (Tr, p 548). Mason, as the conservator of Irwin's Estate, was the sole signatory on the checking account (Tr, p 549).

Following the opening of the checking account, Respondent visited Mason at her home and removed two blank checks from the check-book (Tr. pp 550, 551). At a later date, Respondent unexpectedly arrived at Mason's place of employment, Providence Hospital, where he asked her to sign a $66,836.17 check (check #1002, Exhibit 11). Mason signed the pre-printed check, which named Respondent as the payee (Tr, pp 522-523). Mason claimed that she voiced a protest over the amount of the check, but Respondent informed here that "he deserved it to get paid." (Tr, p 553)

Respondent did not advise Mason that the approval of any individual or a Court was re-

quired in order for him to receive attorney fees from the Estate (Tr, p 555). Additionally, Respondent did not inform Mason of any potential liability she may incur to the Estate fro fees paid to an attorney in excess of those approved by the Probate Court (Tr, p 556). Respondent suggested that Respondent use or spend the Estate's funds "just like it was (her) money." (Tr, p 557). Mason issued a check to herself in the amount of $2000 in December of 1984.

Mason thereafter advised Respondent that she no longer wished for him to represent her (Tr. p 559). She retained Ira Auslander to represent her as conservator and guardian of the Estate (Tr, p 559).

On cross-examination, Mason testified that prior to retaining Respondent as her attorney, she withdrew approximately $6000 from Irwin's savings account (Tr, pp 606-607). She explained that the funds were used to pay

bills of Irwin (Tr, p 606). Bessie Irwin died in 1987 at the age of 95 (Tr, p 650).

Ira Auslander, a practicing attorney in Michigan since 1972, was retained by Ophelia Mason in January 1985. Mason informed Auslander that she was concerned about attorney fees that she, as Irwin's conservator, had paid Respondent. Mason further advised Auslander that she had been suspended as the conservator for failing to file an annual accounting with the Probate Court (Tr, p 371).

Before Auslander decided whether to represent Mason, he had a telephone conversation with Respondent. Auslander advised Respondent about Mason's displeasure with the attorney fees, to which Respondent said, "nobody (is) going to tell me what I can charge my clients." (Tr, p 370).

Auslander determined that the ideal strategy to recoup the allegedly excessive attorney fees paid by Mason to Respondent was

to file a petition seeking to have the fees repaid into the Estate (Tr, p 372). Auslander prepared and filed a petition and also notified Respondent, by letter, that Mason had discharged him as her attorney (Tr, p 372). On January 30, 1985, Auslander and his associate, Carol Trefry, served Respondent with a restraining order and petition to show cause (Exhibits 17 and 43; Tr, p 376).

The attorney f3e that Auslander determined was excessive was a payment by Mason to Respondent on December 4, 1984, in the sum of $66,836.17 (Exhibit 11, Tr, p 378). Following a hearing held in Wayne County Probate Court, Judge Robert Gragg found that the attorney fee was excessive. Judge Gragg held that Respondent was entitled only to $5048 for his representation of Ophelia Mason.

Auslander offered an opinion that Mason acted improperly in issuing the December 4 check to Respondent (Tr, p 380). He was con-

cerned over Mason's liability to the Estate for her imprudent issuance of the check to Respondent.

In a collection action filed by the State of Michigan against Respondent, Attorney Alan May was appointed as the receiver by the Wayne County Circuit Court Judge Richard Dunn on September 17, 1982 (Tr, pp 468-469; Ex.48). A judgment had been entered in favor of the State of Michigan against Respondent in the Common Pleas Court of Detroit on April 28, 1989 (Ex 48). Under the Order, May was authorized to marshall assets of Respondent to satisfy the judgment.

Except for a payment of $175 that he received from the debtor of Respondent, May was unable to collect the funds from Respondent (Tr, pp 478-480). The receivership was closed on May 23, 1989, because of the Receiver's inability to collect, with an outstanding balance of $4,693.57 (Tr, p 482). May testified

that Respondent was aware of the judgment against him and that a Receiver had been appointed to collect on the judgment (Tr, pp 469-470).

In an Amended Order dated May 9, 1985, Probate Judge Robert Gragg ordered that Respondent was entitled to $5048 in attorney fees and costs with respect to his representation of Ophelia Mason (Ex 46). The Order also required that:

> "Inasmuch as Respondent is presently in Receivership, said payment of fees, totaling $5048, is ordered directly to the Receiver, Alan A. May, Circuit Court No. 80-026735 AZ."

Respondent unsuccessfully appealed Judge Gragg's Amended Order to the Michigan Court of Appeals and the Michigan Supreme Court (Ex 19; Ex 20). As indicated, the Receivership was closed May 23, 1989, while the Michigan Supreme court denied Respondent's Application for Leave on February 17, 1988.

Called as an expert witness by the Peti-

tioner, Attorney John VonBatchelder was admitted to practice law in Michigan in 1937 (Tr, p 682). A specialist in probate law, VonBatchelder was familiar with the Irwin Estate based on his review of the various documents prior to testifying (Tr, pp 682-683).

He offered an opinion that the initial fee agreement (Ex 1) entered into between Mason and Respondent was the most unusual fee agreement he had examined during his years of practice (Tr, p 684). As to the power of attorney and assignment (Ex 8), VonBatchelder testified that it was improper for an attorney to enter into such an agreement, because the document gave all of the fiduciary's rights and responsibilities to Respondent and it, in essence, assigned the entire Estate to Respondent (Tr, pp 689-691). VonBatchelder stated that under the agreement, Respondent would be entitled to 1/3 of the Estate even if the fiduciary hired an attorney to replace Respon-

dent (Tr, p 693).

Accordingly to VonBatchelder, the two fee agreements entered into between Mason and Respondent were invalid, since the Probate Court is vested with the power to determine the appropriate attorney fees (Tr, P 696). He stated that contingency fee agreements, such as the one featured in Exhibit 8, are inappropriate in Probate cases (Tr, p 695).

The expert witness, on cross-examination, acknowledged that Probate Court Rule 908.3 governed attorney fees in probate cases in 1984 (Tr, p 726). Under that rule, an attorney fee could be awarded either at the direction of the Probate Court or if all affected parties consented to the fee. VonBatchelder noted that under the current rule, MCR 8.308, all attorney fees have to be approved by the Probate Court (Tr, p 728). VonBatchelder defined "affected parties" as presumptive heirs and other parties with an interest in the

Estate (Tr, p 865).

In VonBatchelder's opinion, the placement of $200,000 of the Estate's funds in a non-interest bearing account was imprudent, (Tr, p 700). He also testified that when an attorney receives notice that a temporary restraining has been signed by a Court prohibiting him from transferring or spending fees that he collected from a client, the attorney has to obey the Order (Tr, p 701). He testified that the Order and Opinion of the Court of Appeals directing Respondent to return funds to the Estate required compliance (Tr, p 702). Von Batchelder agreed with the decision of the Court of Appeals that Respondent charged Ophelia Mason an excessive fee (Tr, p 705). He further stated that it was incumbent upon Respondent to file a petition for instructions in the Probate Court after receiving notice of the Court of Appeals decision (Tr, p 710).

On cross-examination, VonBatchelder

offered specific bases concerning his opinion that the two fee agreements were either improper or excessive. He stated that a contingency fee is inappropriate because the Probate Court needs to determine the value of the attorney's representation (Tr, p 740). He referred to Disciplinary Rule 2-106(A), which prohibits an attorney from entering into a clearly excessive fee agreement (Tr, p 751). VonBatchelder stated that under PCR 908.3, the former rule regarding attorney fees, Respondent's $67,000 attorney fee was improper, for the presumptive heirs of Bessie Irwin's Estate (her two nieces and her nephew) and the nursing home (a creditor) did not consent to the fee (Tr, pp 726, 865-866, 893).

As to the non-refundable $600 required by the original fee agreement (Ex 1), Von Batchelder stated that it was improper because it was not approved by the Probate Court and it did not apply against any costs or legal

services (Tr, p 894). If a fiduciary approved or granted an excessive attorney fee, he or she would be responsible for reimbursing the Estate (Tr, pp 895-896).

Testifying as an expert witness for Respondent, Gerald D. White was admitted to practice law in Michigan in 1955 (Tr, p 1043). A general practitioner, White has had extensive experience in the area of Probate law, including service as a public administrator (Tr, pp 1043-1044).

White testified that under Probate Court Rule 908.3, approval for legal fees can be obtained in two ways: (1) court approval and (2) through the consent of the affected parties (Tr, p 1054). White stated that Respondent's charging of a fee of $200 per hour for his work in the Irwin Estate was reasonable, but that he had not opinion as to the validity of Respondent's contention that he expended 390 hours providing legal services to the Estate

(Tr, p 1046).

On cross-examination, White acknowledged that a waiver and consent form has to be signed by each "affected party". (Tr, p 1057). An attorney seeking approval of legal fees in a probate case should file a petition with the Court for instructions (Tr, pp 1061-1062). White expressed an opinion that it is improper for an attorney to request a non-refundable retainer fee, unless the fee will be applied toward legal fees or costs (Tr, p 1062). He also asserted that an attorney should not accept an exorbitant fee even if all of the affected or interested parties consent (Tr, p 1063). White testified that contingent fees in probate cases are never justified (Tr, p 1064).

William Taylor, an attorney employed by an insurance company, set forth the chronology of Shirley Wright's lawsuit to recover under an insurance policy (Tr, pp 995-996). Wright

suffered damages to real property as a result of a fire, but the insurance company refused to honor the claim because of an investigation that showed that the fire was deliberately set (Tr, p 996). A trial held in 1981 in the Common Please Court resulted in a verdict of $6000 for Wright, who was represented by Respondent (Tr, pp 996-997).

The verdict in Plaintiff's favor was memorialized in an amended order, reflecting a judgment in the amount of $7,428.87 (Ex 28; Tr, p 1001). The insurance company appealed to the Wayne County Circuit Court, which vacated the judgment and remanded the case to the Common Please Court for a new trial (Tr, p 997). The second trial, held in 1984, also resulted in a $6000 jury verdict for Wright (Tr, p 997). While the appeal was pending following the first trial, Respondent, as Wright's attorney, garnished funds from the insurance company's bank in order to collect

on the judgment (Tr, pp 997-998). Taylor complained that Respondent garnished the funds even though an appeal had been filed and an appropriate bond had been posted (Tr. p 998; Ex 29; Ex 57).

Taylor testified that his company obtained a temporary restraining order from Circuit Court Judge Richard Dunn on September 17, 1981 (Ex 34), which enjoined Respondent from negotiating the check issued on the garnishment (Tr, pp 1003-1004). The cashier's check, in the sum of $7,428.87, which was issued by the National Bank of Detroit to Wright and Respondent pursuant to the garnishment, was endorsed and cashed on September 16, 1981 (Ex 29).

The insurance company obtained an Order (Ex 35) from Judge Dunn on December 4, 1981, which vacated the Order of Garnishment issued by a Common Pleas Judge on September 16, 1981. On August 5, 1983, the insurance company was granted a summary judgment by Circuit Court

Judge Thomas Roumell (Ex 36) in its lawsuit to regain the funds that were garnished by Respondent and Wright on September 11, 1981 (Tr, p 1006). The company only was able to collect $540.47 on the summary judgement of $7,428.87 against Respondent, despite its attempts to garnish Respondent's bank accounts (Tr, p 1006). After Plaintiff was successful in the retrial, the insurance company paid Wright and Respondent $743.76 to satisfy the judgment in full (Ex 38).

Attorney James Gross represented the insurance company on appeal following the $6000 jury verdict in 1981. Gross filed a claim appeal and a surety bond in sum of $9000 (Tr, p 1017). Respondent and Gross disagreed over the amount of the bond, as Respondent contended that the bond should be twice the amount of the judgment (Tr, pp 1017-1018). Gross thereupon filed a motion in the trial court to stay proceedings and for a determination of the

appeal bond (Tr p 1018).

While the motion of Gross was pending the trial court, Respondent obtained a writ of garnishment, which he executed, against the insurance company (Tr, p 1020). In an attempt to thwart Respondent's attempts to garnish the insurance company's account, Gross obtained an ex-parte Order from Judge Dunn on September 17, 1981 (Ex 35), restraining Shirley Wright and Respondent from cashing or negotiating the cashier's check issued as a result of the writ of garnishment (Tr 1021). Respondent advised Gross that he would not return the funds ($7,428.87) that he obtained by way of the garnishment and that Gross would have to sue him in order to recoup the money (Tr, p 1022). Gross was able to obtain an Order vacating the garnishment on December 4, 1981 (Ex 35), but the Order did not require Respondent to return the funds that he gained as a result of the garnishment (Tr, p 1022).

Gross' involvement in the Shirley Wright vs. Group Insurance Company of Michigan case ended when the verdict in the first trial was overturned by the Wayne County Circuit Court (Tr, p 1024). Gross admitted that the judgment in favor of Wright (Ex 28) was the subject of an execution by Respondent before the bond on appeal was approved (Tr, p 1025). Gross asserted that a stay of proceeding should have resulted from his filing of a motion for a new trial and an appeal bond with the Court (Tr, p 1033).

Ronald Karp, an attorney, was appointed by the Attorney Grievance Commission to serve as a volunteer investigator in the Shirley Wright grievance (Tr, p 961). The grievance concerned Respondent's alleged failure to account for proceeds received from a breach of an insurance contract case litigated in the 36th District Court (Tr, p 961).

Karp interviewed Wright and Respondent

separately in April of 1987 (Tr, p 962). On July 13, 1987, Karp submitted a report to the Attorney Grievance Commission concerning his findings about the fee dispute (Tr, p 963).

According to Karp, Respondent stated that he (1) obtained a favorable jury verdict in the 36th District Court, which he reduced to a judgment; (2) collected on the judgment in September of 1981 through a garnishment procedure; (3) retained the funds in cash until disbursing them in February of 1987; and (4) kept the proceeds in cash at the request of Shirley Wright, who feared that the insurance company would recover the funds by way of a garnishment action (Tr, pp 968-969). Karp expressed an opinion that, under DR 9-102, a client's funds may not be held in cash, but must be deposited in an identifiable bank account (Tr, pp 990-991).

The final witness for Petitioner was Mary Sanders. Employed as the head teller at a

National Bank of Detroit branch, Sanders cashed the $7,428.87 cashier's check (Ex 29) for Respondent on September 16, 1981 (Tr, pp 1193-1195). Respondent was alone when he endorsed the check, which had earlier been endorsed by the co-payee, Shirley Wright (Tr, pp 1194-1195). The check was returned unpaid to the National Bank of Detroit, with a notation that it was "not used for purpose intended" (Tr, p 1196).

The proceeds from the check were distributed in the following manner; $2,828.98 was deposited in an account held by Respondent; $3,583.89 was deposited in a trust account of Respondent, and $1,016.00 was disbursed to Respondent in cash (Tr, pp 1199, 1202, 1207). The two bank account numbers of Respondent were written on the back of the cashier's check by Sanders (Tr, p 1196).

Respondent testified that he was admitted to practice law in Michigan in 1969 (Tr, p

205). A portion of his practice is devoted to probate cases (Tr, pp 206-207).

Respondent first met with Ophelia Mason on September 15, 1983, concerning Mason's handling of the personal affairs of an elderly woman, Bessie Irwin, who was living in a nursing home (Tr, pp 902-903). Mason was concerned about Irwin's declining physical condition and the escalating bills of Irwin that Mason was paying pursuant to a power of attorney granted to her by Irwin (Tr, p 903). Respondent suggested that Mason seek an appointment as the guardian and conservator of Irwin (Tr, p 905). Mason advised Respondent that Irwin had a limited income (Social Security benefits and nominal dividends) and a depleted savings account (Tr, p 907).

Mason entered into a fee agreement with Respondent (Ex 1), which provided that he would receive a $600 non-refundable retainer fee and a $350 payment for each court appear-

ance (Tr, pp 209, 908). In June of 1984, Mason informed Respondent that she could not afford to pay him $350 per court appearance (Tr, pp 924-925). Thereupon, Respondent suggested that she pay him on a contingency fee basis (Tr, p 925). A new fee agreement (Ex 8) entitled a "Power of Attorney and Assignment", was arrived at by Mason and Respondent (Tr, pp 228-231); 927). Through this agreement, Respondent acquired a one-third vested interest in Irwin's Estate (Tr, p 237).

Respondent admitted that he accepted a check, for legal services, from Mason in the sum of $66,836.17 (Ex 11). Shortly thereafter, without the approval of the Probate Court, Respondent cashed the check (Tr, pp 254-225; 1109). He claimed that he deposited more than $55,000 of the proceeds into his corporate account, receiving the balance in cash (Tr, pp 258-259; 265-266). Respondent asserted that he was entitled to a fee exceed-

ing $66,000, since under the power of attorney and assignment, Mason was obligated to pay him one-third of the Estate's assets (Tr, p 953). Respondent claimed credit for uncovering $1,000,000 worth of assets owned by Irwin (Tr, pp 2523; 1130-1131).

As to the Restraining Order (Ex 17) prohibiting Respondent from transferring, spending, or encumbering funds that he received from the Estate, Respondent testified that he did not disobey the Order because he had spent the money before January 31, 1985. He admitted that he had not complied with the Opinion of the Michigan Court of Appeals, which directed him to reimburse the Estate (Tr, pp 1160, 1190). He justified his inaction by stating that the Court of Appeals solely remanded the case to the Probate Court (Tr, p 1190).

Respondent contended that he did not provide false and misleading information to the Probate Court regarding his accounting of the

funds he derived from the Irwin Estate (Ex 14; Tr, pp 1135-1135; 1172-1174). He testified that he made $31,000 in cash payments to Lewis Love, Floyd Rickenbacker, and the State of Michigan (Tr, pp 1172-1174). Respondent lacked receipts supporting his claim that he made case payments to Love and Rickenbacker (Tr, p 1173).

Respondent admitted that he failed to obey the Order requiring him to make payments to the Receiver, because the latter had not poster a proper bond and because he "refused to be in servitude" (Tr, p 324).

With respect to the charges lodged by the Grievance Commission concerning Respondent's representation of Shirley Wright, Respondent denied that he violated a Restraining Order prohibiting him from transferring or disposing of the $7,428.87 cashier's check (Tr, p 1351). He cashed the check prior to receiving a copy of the Order, holding the funds in the form of

cash at the direction of Shirley Wright (Tr, p 1352). The money remained in his office safe until 1987 (Tr, p 1352).

Shirley Wright did not appear to testify on the fifth, and last, hearing date, despite having been served with a subpoena (Tr, p 1356). The competing attorneys made closing arguments and Petitioner's attorney filed a brief, in response to Respondent's brief, ten days after the closing arguments were heard.

V. Findings of Fact -- Case No. 25-88

(A) Count I -- Failure to file an Inventory and an Accounting

1. Respondent was discharged as Ophelia Mason's attorney before the annual accounting was due.

2. The duty to prepare and file an Inventory rests with the fiduciary, rather than the fiduciary's attorney, who is responsible for assisting the fiduciary.

3. Respondent testified unrebuttedly that Mason did not furnish him with the documentation he needed to assist her in preparing the Inventory.

CONCLUSION: Respondent did not commit professional misconduct as alleged in Court I of the formal complaint.

(B) Count II -- Charging and collection of excessive fees

1. Respondent entered into an initial fee agreement with Ophelia Mason on September 15, 1983, through which he charged and received a $600 non-refundable retainer.

2. The initial fee agreement shows that the client, Ophelia Mason, was responsible for all costs incidental to the probate case.

3. Contrary to the language contained in Exhibit 1, Respondent testified that he, rather than Mason, was responsible for

the costs related to the guardianship and conservatorship.

4. On June 26, 1984, a superseding fee agreement was arrived at by Mason and Respondent. From that date, Respondent was entitled to one-third contingency fee as to the Estate's assets.

5. The revised fee agreement gave Respondent a one-third vested interest in the Estate.

6. Mason signed the contingency fee agreement at the urging of Respondent.

7. Based on the expert witness testimony of John VonBatchelder and Gerald White, and on the reasoning of the Opinion of the Michigan Court of Appeals, the Master determines that a contingency fee agreement is prohibited in probate cases. The probate judge determines the appropriate attorney fee, based on numerous factors, including the experience of the attorney

and the complexity of the work.

8. Without the approval of the Probate Court, Respondent accepted a $66,836.17 fee from Ophelia Mason.

9. In accepting and cashing the $66,836.17 check, Respondent did not have the approval of the affected parties (the nursing home and Bessie Irwin's nieces and nephew).

10. Under PCR 908.3 (the applicable rule in 1983-84), an attorney may not accept an attorney fee in a probate matter unless he has either the approval of the Probate Judge or all of the affected parties.

11. Although Respondent did obtain a vested one-third interest in the Estate through the revised fee agreement (Ex 8), he did not deprive Mason of an opportunity to retain a substitute attorney, as evidenced by Ira Auslander's involvement

in the guardianship and conservatorship.

12. Respondent did not obtain the approval of either the Probate Court or the affected parties before accepting the $600 non-refundable retainer fee.

CONCLUSION: Respondent committed professional misconduct by (1) entering into a clearly excessive fee agreement (the contingency fee contained in Ex 8) with Ophelia Mason; (2) collecting the fee without the authority of either the Probate Court or the "affected parties;" and (3) collecting a $600 retainer fee without first seeking the approval of the Probate Court or the "affected parties". Petitioner did not preponderate on its allegation that Mason's right to retain substitute counsel was impeded by the contingency fee agreement.

(C) Count III -- Failure to obey an Order of Michigan Court of Appeals

1. On May 9, 1985, Probate Judge Gragg

held that Respondent was entitled to only $5048 for his representation of the guardian/conservator, Ophelia Mason.

2. Respondent appealed the Probate Court's decision to the Michigan Court of Appeals.

3. The Court of Appeals, on May 27, 1987, issued an Opinion, reversing the decision of the Probate Court and remanding the case to that Court. The appellate court determined that Respondent earned only $1657 in attorney fees.

4. Respondent has nominally complied with the Probate Court and Court of Appeals directives regarding his obligation to reimburse the Estate for the excessive legal fees that he received, reimbursing the Estate in the sum of $1357.

5. Respondent and Ophelia Mason's attorney each had a duty to file a Peti-

tion for Instructions in the Probate Court following the remand of the Court of Appeals.

CONCLUSION: Respondent disregarded the Order of the Michigan Court of Appeals, which indirectly ordered him to return the excessive fees to the Estate. Respondent had a duty to reimburse the Estate pursuant to the Probate Court's Order of May 9, 1985. Respondent acted improperly in making only a woefully minimal effort to reimburse the Estate after receiving adverse rulings from the Probate Court and the Court of Appeals.

(D) Count IV -- Violation of A temporary Restraining Order

1. On January 31, 1985, Probate Judge Gragg signed a Temporary Restraining Order, enjoining Respondent and Respondent's law firm from transferring, spending, or encumbering any funds received from the Estate of Bessie Irwin.

2. Respondent was served with a copy of the Restraining Order on January 31, 1985.

3. Respondent withdrew $9000 from his law firm's checking account, at Comerica Bank-Detroit, on February 1, 1985 (Ex 12).

4. The record shows that the $9000 was part of a $55,836.17 deposit made by Respondent on December 5, 1984, at Comerica Bank-Detroit (Ex 12). The deposit was generated by a $66,832.17 check (Ex 11) that Respondent requested and received from the Estate's conservator, Ophelia Mason, on December 5, 1984.

CONCLUSION: Respondent knowingly violated an Order of the Probate Court by transferring funds on February 1, 1985, that he received from Bessie Irwin"s Estate.

(E) Count V -- The making of false statements to the Probate Court

1. On September 10, 1986, Respondent was ordered by the Probate Court to account for the money received from the Irwin Estate.

2. Respondent filed an accounting on September 23, 1986.

3. Respondent claimed, among other things, that he made case payments in December, 1984, and January, 1985, to Lewis Love ($14,000), Floyd Rickenbacker ($10,000), and the State of Michigan ($7500).

4. Respondent testified that he made the foregoing cash payments, but that he had cash receipts only from the State of Michigan.

5. Petitioner did not meet its burden of disproving Respondent's claim that he made cash payments totaling $31,500 to Love, Rickenbacker, and the State of Michigan with funds he

gained from the Irwin Estate.

CONCLUSION: Respondent did not make any material misstatements to the Probate Court in his accounting of September 23, 1986.

(F) Count IV -- Failure to pay or turn over assets to the Receiver

1. On April 28, 1980, a judgment was entered in the Common Pleas Court against Respondent in favor of the State of Michigan, Department of Treasury.

2. On September 17, 1982, an Order Appointing a Receiver, Alan May, was signed by Wayne County Circuit Court Judge Richard Dunn, authorizing the Receiver to marshall the assets of Respondent in order to satisfy a Judgment in the sum of $1,360.74 plus costs and interest.

3. The Receiver only collected $175.00 through his efforts to marshall the assets of Respondent.

4. The Receivership was closed on May 23, 1989, with a balance of $4,693.57, on account of the Receiver's inability to obtain any of Respondent's assets.

5. Respondent was served with a copy of the Order Appointing a Receiver.

6. On May 9, 1985, Probate Judge Robert Gragg ordered Respondent to turn over his approved legal fee $5048, to the Receiver, an Order with which Respondent did not comply.

7. In Count VI of the formal complaint, Petitioner did not allege that Respondent violated Judge Gragg's Order of May 9, 1985.

CONCLUSION: Respondent did not commit professional misconduct in failing to turn over his assets to the Receiver. Judge Dunn's Order did not affirmatively require Respondent to pay money to Alan May; rather, it empowered May to collect on a judgment against Respon-

dent. The failure to satisfy a judgment by an attorney certainly is not laudable or justifiable, but does not constitute misconduct. An Order that may have been violated by Respondent in regard to the Receivership was Judge Gragg's Order dated May 9, 1985, but that violation is not part of the allegations embraced in Count VI of the formal complaint.

VI. Findings of Fact -- Case No. 133-88

(A) Count I -- Improper handling of a client's funds

1. Respondent successfully litigated a fire insurance claim in the Common Pleas Court, earning a judgment in the sum of $7,428.87 for Shirley Wright.

2. The insurance company appealed the judgment entered on the verdict, but Respondent collected on the judgment by way of a garnishment procedure before the case was formally stayed by the Common Pleas Court or the Wayne County Circuit

Court.

3. Respondent endorsed and cashed the garnishment check on September 16, 1981.

4. When Respondent negotiated the $7,428.87 cashier's check at the National Bank of Detroit, he deposited $3,583.89 in a trust account and another $2,828.98 in a second account, while receiving $1,016 in cash.

5. As to the $3,583.89 deposit into his trust account, Respondent withdrew all but $198.02 in 1981 and 1982.

6. Respondent did not pay any interest to Shirley Wright with respect to the funds he derived from the judgment entered in favor of Wright.

CONCLUSION: Respondent violated DR 9-102 (A) by not depositing Shirley Wright's funds, derived from a judgment, in an identifiable bank account. He also misappropriated Wright's funds by depositing part of them into

his own account, withdrawing part of them from his trust account, and by receiving the remainder in ~~cash.~~ The other allegations contained in Court I, Paragraph K either were not proven by Petitioner or constitute factual, instead of legal, averments.

(B) Count II -- Violation of a Temporary Restraining Order

1. On July 16, 1981, an Amended Judgment was entered in favor of Shirley Wright, Respondent's client, in the Common Pleas Court in the sum of $7,428.87.

2. The insurance company appealed the judgment, but was unable to obtain a stay of proceedings before Respondent garnished the bank account of the insurance company.

3. Pursuant to a writ of garnishment served by Respondent, the insurance company's bank issued a cashier's check to Respondent and Shirley Wright on

September 16, 1981.

4. Respondent negotiated the cashier's check at the National Bank of Detroit on September 16, 1981, depositing part of the $7,428.87 in two accounts, while receiving the remainder in cash.

5. On September 17, 1981, Circuit Court Judge Richard Dunn Entered a Temporary Restraining Order at the request of the insurance company, prohibiting Respondent from negotiating the garnishment check.

CONCLUSION: Respondent did not violate Judge Dunn's Temporary Restraining Order of September 17, 1981, because he negotiated the check one day before the Restraining Order was issued.

(C) Count III--False statements made in connection with a Request for Investigation

1. Ronald Karp, an attorney, was appointed by the Attorney Grievance Commission to serve as a Volunteer Investigator

regarding a Grievance filed by Shirley Wright against Respondent.

2. As part of his duties, Karp interviewed Respondent in April of 1987.

3. Karp prepared a Report embracing his findings, but the document was not introduced as an exhibit at the hearing.

4. Respondent advised Karp that he retained all of the proceeds derived from the judgment in cash, at Wright's request.

5. Since Shirley Wright did not testify, it cannot be shown that Respondent falsely informed Investigator Karp that Wright asked him to hold the funds in cash in order to avoid a garnishment.

6. Respondent falsely reported to Investigator Karp that he held the proceeds derived from the cashier's check of September 16, 1981, along with other bank exhibits, reveal that Respondent deposit-

ed $6,412.87 of the $7,428.87 in two accounts, receiving the remainder in cash. Subsequent to that transaction, he withdrew all but $198.02 from his trust account. Thus, Respondent did not keep the proceeds of the garnishment check at his office, as he represented to Karp.

CONCLUSION: Respondent committed professional misconduct by knowingly providing false information to a Volunteer Investigator of the Attorney Grievance Commission who was investigating a grievance filed against Respondent.

VII. Conclusions of Law -- Case No. 25-88

Respondent committed professional misconduct in the following ways:

1. By collecting a $600 non-refundable retainer fee without obtaining either the approval of the Probate Court or the affected parties (as required by Probate Court Rule 908.3), in violation of DR 2-106(A) and (B), and MCR 9.104(1-4).

2. By charging and, without the approval of the Probate Court or the affected parties (as required by PCR 908.3), collecting a clearly excessive fee; a one-third contingency fee, in violation of DR 2-106(A) and (B), and MCR 9.104 (1-4).

3. By violating an Order and Opinion of the Michigan Court of Appeals which directed him to take steps to reimburse the Irwin Estate for excessive fees that he received, in violation of DR 7-106(A), DR 1-102(A)(5), and MCR 9.104(1-4).

4. By knowingly violating an Order of the Wayne County Probate Court, dated February 1, 1985, which enjoined him from transferring or spending funds that he received through the Irwin Estate, in violation of DR 7-106(A), DR 1-102(A)(5), and MCR 9.104 (1-4).

The other allegations contained in the

formal complaint, namely, the failure to file an Inventory and an Accounting, the encumbering of the fiduciary's right to retain a substitute attorney, the making of false statements to the Probate Court, and the failure to turn assets over to the Receiver, were not proven by a preponderance of the evidence. Respondent's affirmative defenses were not proven and, in fact, were not seriously advanced.

VIII. Conclusions of Law -- Case No. 133-88

Respondent committed professional misconduct in the following manner:

1. By failing or neglecting to deposit the funds of a client, Shirley Wright, which he obtained through the collection of a judgment, in an identifiable bank account, in violation of DR 9-102(A), Dr 1-102(A) (4-5), and MCR 9.102(1-4).

2. By misappropriating the funds of a client, Shirley Wright, in violation of

DR 9-102(A), Dr 1-102(A) (4-5), and MCR 9.102(1-4).

3. By knowingly providing false information to a Volunteer Investigator assigned by the Attorney Grievance Commission to investigate a grievance filed against Respondent, in violation of DR 1-102(A) (4-5) and MCR 9.103(3)(4)(6).

The other allegations embraced in the formal complaint were not proven by a preponderance of the evidence. Respondent's affirmative defenses were not proven.

ATTORNEY DISCIPLINE BOARD

By_____

Steven M. Kaplan, Master

Dated: November 2, 1989

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: May 31, 1991

91111(6)(7)(8)

GRIEVANCE ADMINISTRATOR, STATE OF MICHIGAN, ATTORNEY GRIEVANCE COMMISSION,

Petitioner-Appellee,
Cross-Appellant,

v

SC: 91111
ADB: 25-88, 133-88
AGC: 51/87, 90/88

FLETCHER J. CAMPBELL,

Respondent-Appellant,
Cross-Appellee.

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The motion for reconsideration of this Court's order of March 22, 1991 is considered, and it is DENIED because it does not appear that the order was entered erroneously. The motion for stay is DENIED as moot.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

May 31, 1991 _____ Clerk

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: March 22, 1991

91111(6)(7)(8)

GRIEVANCE ADMINISTRATOR, STATE OF MICHIGAN, ATTORNEY GRIEVANCE COMMISSION,

Petitioner-Appellee,
Cross-Appellant,

v

SC: 91111
ADB: 25-88, 133-88
AGC: 51/87, 90/88

FLETCHER J. CAMPBELL,

Respondent-Appellant,
Cross-Appellee.

On order of the Court, the motions for immediate consideration are considered, and they are GRANTED. The motion for application for leave to appeal as cross-appellant also are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

The motions for stay are DENIED, as moot.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

March 22, 1991 _____ Clerk

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

ADB 25-88;133-88

v

Fletcher J. Campbell, P11544

Respondent.
_____/

SUPPLEMENT TO ORDER DENYING MOTIONS FOR RECONSIDERATION

Considered by the Attorney Discipline Board
One Kennedy Square, Suite 1910, Detroit, MI

PRESENT: Hanley M. Gurwin, Chairman

On November 15, 1990, the Attorney Discipline Board entered its order granting the stay of discipline requested by the respondent. That order further provided that the stay of discipline should remain effective for twenty-one (21) days after the entry of an order granting or denying reconsideration.

On February 25, 1991, the Board entered its order in this matter denying the motions for reconsideration filed by the respondent

and the Grievance Administrator.

NOW, THEREFORE, in accordance with the Board's order of November 15, 1990 and the provisions of MCR 9.118(D),

IT IS ORDERED that the stay of discipline granted by the Board in this matter effective November 15, 1990 shall remain effective for twenty-one (21) days following entry of the Board's order denying motions for reconsideration on February 25, 1991.

IT IS FURTHER ORDERED that the respondent's suspension from the practice of law as ordered by the Attorney Discipline Board shall become effective March 19, 1991, or unless otherwise ordered by the Board or the Supreme Court.

ATTORNEY DISCIPLINE BOARD

By_____
Hanley M. Gurwin, Chairman

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

ADB 25-88;133-88

v

Fletcher J. Campbell, P11544

Respondent.

_____/

ORDER REDUCING DISCIPLINE

Considered by the Attorney Discipline Board
One Kennedy Square, Suite 1910, Detroit, MI

PRESENT: John F. Burns
Hon. Martin M. Doctoroff
Remona A. Green
Robert S. Harrison
Linda S. Hotchkiss, M.D.
Theodore P. Zegouras

The Attorney Discipline Board has considered the Petition for Review filed by the respondent seeking review of a hearing panel order of revocation filed in this matter. The Board conducted review proceedings in accordance with MCR 9.118 and has concluded that the discipline imposed should be reduced from revocation to a three-year suspension, and being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the SUSPENSION OF RESPONDENT'S FOR A PERIOD OF THREE (3) YEARS SHALL COMMENCE November 16, 1990. Respondent shall remain suspended until further order of the Supreme Court, the Attorney Discipline Board or a hearing panel.

IT IS FURTHER ORDERED that for purposes of any further appeal, this order shall be deemed effective November 16, 1990.

IT IS FURTHER ORDERED that all provisions of the Order of Revocation filed by the hearing panel shall remain in full force and effect except as modified.

ATTORNEY DISCIPLINE BOARD

By_____
Hanley M. Gurwin, Chairman

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

ADB 25-88;133-88

v

Fletcher J. Campbell, P11544

Respondent.

_____/

ORDER OF REVOCATION

Considered by the Attorney Discipline Board
Wayne County Hearing Panel #11

PRESENT: David I. Rosin, Chairman
Arthur J. Tarnow, Member
Dawn A. VanHoek, Member

This matter having come before the panel upon the filing of Formal Complaints ADB 25-88 and ADB 133-88 which were consolidated for hearing. This matter was referred to a master for findings of fact, and that report containing the findings and conclusion that misconduct had been established by a preponderance of the evidence, and the panel having conducted a hearing on the level of discipline to be imposed on January 18, 1990 and having fil-

ed that report, and being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the license to practice law of respondent Fletcher J. Campbell is REVOKED COMMENCING March 23, 1990 until further order of the Supreme Court, the Attorney Discipline Board of a hearing panel and until respondent complies with the requirements of MCR 9.123(B) and MCR 9.124.

IT IS FURTHER ORDERED that from the effective date of this Order and until reinstatement in accordance with the applicable provisions of MCR 9.123, Respondent is forbidden from practicing law in any form; appearing as an attorney before any court, judge, justice, board, commission or other public authority; or holding himself out as an attorney by any means.

IT IS FURTHER ORDERED that Respondent shall, within seven (7) days of the effective date of this Order, notify all of his acti e clients, in writing, by registered mail,

return receipt requested, of the following:

1) the nature and duration of discipline imposed;

2) the effective date of such discipline;

3) respondent's inability to act as an attorney after the effective date of such discipline;

4) the location and identity of the custodian of the clients' files and records which will be made available to them or to substitute counsel;

5) that the client may wish to seek legal advise and counsel elsewhere; provided that if respondent is a member of a law firm, the firm may continue to represent each client with the client's express written consent;

6) the address to which all correspondence to respondent may be addressed.

IT IS FURTHERED ORDERED that in accor-

dance with MCR 9.119(B), Respondent must, by the effective date of this Order, in every matter in which Respondent is representing a client in litigation, file with the tribunal and all parties a notice of Respondent's disqualification from the practice of law.

IT IS FURTHER ORDERED that Respondent shall, within fourteen (14) days of the effective date of this Order, file with the Grievance Administrator and the Attorney Discipline Board an Affidavit of Compliance as required by MCR 9.119(C)(eff. June 1, 1987).

IT IS FURTHER ORDERED that Respondent's conduct after the entry of this Order but prior to its effective date, shall be subject to the restrictions set forth in MCR 9.119(D) (eff. June 1, 1987); and Respondent's compensation for legal services shall be subject to the restrictions described in MCR 9.119(F) (eff. June 1, 1987).

IT IS FURTHER ORDERED that Respondent shall, within 180 days of the effective date of this Order, pay costs in the amount of

$5979.83. Cost payments shall be made payable to the State Bar of Michigan but submitted to the Attorney Discipline Board [One Kennedy Square, Suite 1910, Detroit, MI 48226] for proper crediting. Failure to reimburse the State Bar of Michigan within the time prescribed will result in Respondent's automatic suspension from the practice of law in accordance with MCR 9.128. (eff. June 1, 1987).

ATTORNEY DISCIPLINE BOARD
Wayne County Hearing Panel #11

By_____
David I. Rosin, Chairman

600.2146 Record made in regular course of business; surrounding circumstances; lack of entry; photostatic reproduction

Sec. 2146. Any writing or record whether in the form of an entry in a book or otherwise, made as a memorandum of any act, transaction, occurrence or event shall be admissible in evidence in all trials, hearings and proceedings in any cause or suit in any court, or before any officer, arbitrators, or referees, in proof of said act, transaction, occurrence or event if it was made in the regular course of any business and it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker, may be shown to affect its weight but not its admissibility. The term "business" shall include business, profession, occupation and calling of every kind. The lack of an entry regarding any act, transaction, occur-

rence or event in any writing or record so proved may be received as evidence that no such act, transaction, occurrence or event did, in fact, take place. Any photostatic or photographic reproduction of any such writing or record shall be admissible in evidence in any such trial, hearing or proceeding by order of the court, made within its discretion, upon motion with notice of not less than 4 days. All circumstances of the making of such photostatic or photographic reproduction may be shown upon such trial, hearing or proceeding to affect the weight but not the admissibility of such evidence. P.A.1961, No.236, §2146, Eff. Jan 1, 1963.

RULE 2.203 JOINDER OF CLAIMS, COUNTERCLAIMS, AND CROSS-CLAIMS

(B) Permissive Joinder. A pleader may join as either independent or alternate claims as many claims, legal or equitable, as the pleader has against an opposing party. If a claim is one previously cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court may grant relief only in accordance with the substantive rights of the parties.

RULE 2.312 REQUEST FOR ADMISSION

(A) Availability; Scope. Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request. Copies of the documents must be

served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested must be stated separately.

RULE 2.504 DISMISSAL OF ACTIONS

(B) Involuntary Dismissal; Effect.

(1) If the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant.

(2) In an action tried without a jury, after the presentation of the plaintiff's evidence the defendant, without waiving the right to offer evidence if the motion is not granted, may move for dismissal on the ground that on the facts and the law the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

RULE 2.505 CONSOLIDATION; SEPARATE TRIALS

(A) Consolidation. When actions involving a substantial and controlling common question of law or fact are pending before the court, it may

(1) order a joint hearing or trial of any or all the matters in issue in the actions;

(2) order the actions consolidated; and

(3) enter orders concerning the proceedings to avoid unnecessary costs or delay.

RULE 7.210 RECORD ON APPEAL

(1) Return of Record. After the Court of Appeals disposes of an appeal and the period for a timely application for leave to appeal to the Supreme Court has expired without the filing of an application, the Court of Appeals shall promptly return the original record to the clerk of the court or tribunal from which it was received, together with a certified copy of the opinion, judgment, or order entered by the Court of Appeals.

(J) Notice by Trial Court or Tribunal Clerk. The trial court or tribunal clerk shall promptly notify all parties of the return of the record in order that they may take the appropriate action in the trial court or tribunal under the Court of Appeals mandate.

RULE 7.215 OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FROM COURT OF APPEALS

(F) Execution and Enforcement.

(1) Routine Issuance. Unless otherwise ordered by the court or otherwise provided by these rules, execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned (by the clerk under MCR 7.210[I] or by the Supreme Court clerk under MCR 7.311[B] with a certified copy of the court's judgment or, if a record was not transmitted to the Court of Appeals, after the time specified for return of the record had it been transmitted.

RULE 8.121 CONTINGENT FEES IN CLAIMS OR ACTIONS FOR PERSONAL INJURY AND WRONGFUL DEATH

(A) Allowable Contingent Fee Agreements. In any claim or action for personal injury or wrongful death based upon the alleged conduct of another, in which an attorney enters into an agreement, expressed or implied, whereby the attorney's compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is in excess of such a fee shall be deemed to be the charging of a "clearly excessive fee" in violation of Canon 2, DR 2-106(A) of the Code of Professional Responsibility and Canons.

(B) Maximum Fee. The maximum allowable fee for the claims and actions referred to in

subrule (A) is one-third of the amount recovered.

* * * *

(F) Agreements to Be in Writing. Contingent fee arrangements made by an attorney with a client must be in writing and a copy provided to the client.

RULE 8.303 COMPENSATION OF ATTORNEYS

An attorney is entitled to receive reasonable compensation for services rendered to an estate, in an amount approved by the judge having jurisdiction over the estate. Except when the compensation is consented to by all the parties affected, the attorney must append to an accounting, petition, or motion in which compensation is claimed a written description of services performed, a summary of the work done by the attorney, and any other information that may be helpful to the court in determining compensation. This rule does not apply to independent probate proceedings under

Chapter 3 of the Revised Probate Code

[Amended effective March 1, 1985.]

Staff Comment

MCR 8.303 is based on PCR 908.3

Th rule requires court approval of attorney fees in probate estate proceedings.

RULE 9.110 ATTORNEY DISCIPLINE BOARD

(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys.

* * * *

(C) Internal Rules.

(1) The board must elect annually from among its membership

* * * *

(c) a secretary to keep the minutes of the board's meetings and issue the required notices.

(2) Four members constitute a quorum. The board acts by majority vote of the members present.

* * * *

(4) A special meeting may be called by the chairperson or by petition of 3 board members on 7 days written notice. The notice may be waived in writing or by attending the meeting.

(D) Powers and Duties. The board has the power and duty to

(1) appoint an attorney as its counsel;

(2) appoint hearing panels and masters;

(3) on the filing of a complaint, assign it to a hearing panel or to a master if it appears that the hearing will be a prolonged one;

(4) on request of an aggrieved party, review a final order of discipline or dismissal by a hearing panel;

(5) discipline and reinstate attorneys under these rules;

(6) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;

(7) annually write a budget for the board and submit it to the State Bar Board of Commissioners for approval; and

(8) submit to the Supreme Court proposed changes in these rules.

RULE 9.111 HEARING PANELS

(B) Powers and Duties. A hearing panel shall do the following:

(1) Hold a public hearing on a complaint or reinstatement petition assigned to it within 56 days after the date the complaint is filed with the board or the date that notice of the reinstatement petition is published. A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.

(2) Receive evidence and make written findings of fact.

(3) Discipline and reinstate attorneys or dismiss a complaint by order, under these rules.

(4) Report its actions to the board within 28 days after the conclusion of a hearing.

(5) Perform other duties provided in these rules.

RULE 9.114 ACTION BY ADMINISTRATOR OR COMMISSION AFTER ANSWER

* * * *

(C) Subpoenas.

(1) On request of the administrator or the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents and other things before the administrator or an investigator concerning matters then under investigation.

RULE 9.115 HEARING PANEL PROCEDURE

(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in the non-jury civil action apply to a proceeding before a hearing panel.

* * * *

(F) Prehearing Procedure.

(4) Discovery. Pretrial or discovery proceedings are not permitted except as follows:

(a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not

comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

(d) The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.

RULE 9.126 OPEN HEARINGS; CONFIDENTIAL FILES AND RECORDS

(A) Investigations. Investigations by the administrator or the staff may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public.

(B) Hearings. Hearings before a hearing panel and the board must be open to the public, but not their deliberations.

(C) Papers. Formal pleadings, reports, findings, recommendations, discipline, reprimands, transcripts, and orders resulting from hearings must be open to the public.

(D) Other Records. Other files and records of the board, the commission, the administrator, legal counsel, hearing panels and their members, and the staff of each may not be examined by or disclosed to anyone except

(1) the commission,

(2) the administrator,

(3) the respondent as provided under MCR 9.115(F)(4),

(4) members of hearing panels or the board,

(5) authorized employees,

(6) the Supreme Court, or

(7) other persons who are expressly authorized by the board or the Supreme Court.

If a disclosure is made to the Supreme Court, the board, or a hearing panel, the information concerning attorney or judicial misconduct to the Judicial Tenure Commission, the State Bar of Michigan Client Security Fund, the State Bar of Michigan Committee on Judicial qualifications, and any court-authorized attorney disciplinary or admissions agency.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly;

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to a tribunal controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the

offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) engage in conduct that is prejudicial to the administration of justice;

RULE 103. RULINGS ON EVIDENCE

(d) Plain Error. Nothing in this rule precludes taking notice of plain error affecting substantial rights although they were not brought to the attention of the court.

Note

MRE 103 is identical with Rule 103 of the Federal Rules of Evidence.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, or events, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of

information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Note

MRE 803 is identical with Rule 803 of the Federal Rules of Evidence except:

(2) MRE 803(6) is identical with Federal Rule 803(6) except that the phrase "acts, events, conditions, opinions, or diagnosis" is replaced by the phrase "acts, transactions, occurrences, or events".

HURWITZ, KARP, HIRSCHMAN & WALLACE, P.C.
Attorneys and Counsellor
8283 North Telegraph Road
Dearborn Heights, Michigan 48127

(313) 276-7030

July 13, 1987

Attorney Grievance Commission
Suite 256 - Marquette Building
243 W. Congress
Detroit, MI 48226

Attn: William E. Lang

Re: File No. 0004/87
Shirley A. Wright as to
Fletcher J. Campbell

Dear Mr. Lang:

I received the above file as a volunteer investigator to inquire into the matter and report to your office at the conclusion of my investigation. This letter is my report.

- On December 29, 1986, Shirley Wright filed her Request for Investigation of respondent. Essentially, her complaint was that respondent refused to account for approximately $7,600 he received on her behalf as a result of litigating a fire loss claim on an insurance policy issued by AAA. Initial litigation

was by trial in 36th District Court in 1979 resulting in a jury verdict in favor of Shirley Wright.

- On January 9, 1987, the Attorney Grievance Commission forwarded the Request for Investigation.

- On February 6,1 987, respondent distributed funds held on behalf of Ms. Wright; the gross amount was $7,668.15 of which $2,933.85 were attorney fees (one-third) and $4,734.30 as the net proceeds of the claim to client.

Ms. Wright's Request for Investigation complained that respondent failed to account to her when he received the funds ultimately disbursed and he refused to disburse them for many years. She also complains that she did not receive interest on $7,428.87 which respondent had been holding since September 1981.

The undersigned reviewed the file received from your office, interviewed Shirley

Wright on April 11, 1987, interviewed respondent on April 13, 1987, held a second interview with respondent on April 25, 1987, and conducted a telephone conference with William Taylor at AAA's attorney office on May 11, 1987. The undersigned also reviewed additional documents provided by Shirley Wright pertaining to the litigation handled by respondent which consisted of miscellaneous pleadings and settlement statement. A review of the Code of Professional Responsibility was also conducted.

The following historical events are relevant to this matter.

1. In 1979 respondent entered a judgment in favor of Ms. Wright in 36th District Court, upon a jury verdict of $6,000 plus interest, for her damages in a fire loss in 1976. The claim arose out of the insurance policy issued by AAA.

2. September 1981 respondent received $7,422.87 pursuant to a Writ of Garnishment

upon National Bank of Detroit (garnishee defendant) as a result of the Writ of Garnishment served to collect the Judgment of 1979 against AAA.

3. Ms. Wright claims that respondent failed to disclose the receipt of the garnishment funds, made no accounting to her and made no disbursement upon receipt.

4. On September 17, 1981, an Ex Parte Order was entered in the Wayne County Circuit Court (at the request of AAA on their appeal of the Judgment entered in 1979 in 36th District Court) providing that "... SHIRLEY WRIGHT and/or FLETCHER J. CAMPBELL. ... be ... ENJOINED from disposing of the proceeds from same (proceeds of the Writ of Garnishment in the amount of $7,428.87) pending the further order of this Court;..."

5. Respondent claims that Ms. Wright knew that he had collected the funds and requested that the hold the $7,428.87 in cash so that they would not be subject to garnishment

by AAA. Shirley Wright denies any such knowledge and denies that she had any accounting from respondent regarding the funds.

6. Respondent states that he held $7,428.87 in the form of cash from September 9181 until disbursed to Ms. Wright in February 1987.

7. In September 1986 the fire loss claim was retried in 36th District Court resulting in a verdict in favor of Ms. Wright in the principal sum of $6,000. Interest upon the principal sum was denied because respondent held ~~AAA's~~ money, in full satisfaction of the prior judgment, since September 1981.

8. In 1982 AAA filed a Circuit Court action against Shirley Wright and respondent to recover the garnishment funds which it claimed respondent obtained in violation of an order staying proceedings on the appeal of the 1979 36th District Court Judgment. A Default Judgment was entered against Shirley Wright and respondent for $7,428.87, plus interest

and costs. AAA received $504.48 from a Writ of Garnishment upon a bank account of respondent.

9. After the $6,000 Judgment of September 19, 1986 (retrial of the fire loss claim) the 36th District Court denied any interest upon said sum and the claim was finally settled between respondent and the AAA attorney on October 21, 1986. As of October 21, 1986, respondent held a total of $7,668.15 representing adjusted gross proceeds of claim after deducting the amount AAA garnishment against respondent's funds.

10. The Request for Investigation was prompted by respondent's refusal to account for the funds he held and his refusal to disburse the same. Respondent claims that he strongly urged Ms. Wright to appeal the denial of interest upon the $6,000 Judgment of September 1986. He further claims that her signature on the final settlement statement of February 6, 1987 waives any claim to interest

and abandons all efforts to appeal. Respondent claims that, only upon Ms. Wright's consent to abandon the appeal and waiver of interest (on February 6, 1987) could he then finally disburse the funds to her.

This case involves a credibility issue as to what respondent told his client in 1981 after receiving funds on her behalf and what instructions she gave him. It is highly unusual to hold $7,428.87 in the form of cash from September 1981 to February 1987. Respondent was unable to specifically identify the physical location of the case; e.g. safe deposit vault, desk drawer, office safe, etc. If there was any misconduct on the part of respondent it would be a violation of DR 9-102 "Preserving Identity of Funds and Property of a Client". There may have also been a violation of DR 4.101(B)(3) pertaining to the violation of confidences of a client for the advantage of himself.

In final summary, it appears that respondent had the use of $7,428.00 from September 1981 until February 1987. Those funds did not draw any interest and none was distributed to Ms. Wright. The fact that the respondent held those funds since September 1981 was the basis of the 36th District Court's denial of interest on the principal judgment of $6,000 after the retrial in September 1986. The only one who lost the interest was the client. The attorney had the use of the funds during that time. Had the money been invested at an annual rate of 6% for the six year period there would have been an additional $2,476.00 available for disbursement; two-thirds of which would be the property of the client.

Ms. Wright was reluctant to continue with her Request for Investigation if that would result in discipline for respondent. She expressed an interest in obtaining a more complete accounting of her claim and collection of interest.

If there is any further service I can perform in this matter please do not hesitate to contact me.

Very truly yours,

Ronald Karp

RK:djm

ADDITIONAL SPECIFIED MATERIAL UNDERLYING FEDERAL QUESTIONS RAISED IN STATE COURT
[See, Sup.Ct.R. 1.(h) and (k)]

The questions presented for review to this Honorable Court were raised by the Petitioner at the first opportunity by formal pleadings. Specifically the federal questions with respect to the appointment of a Master while a panel was in place was first raised when the Order appointing a Master was entered on December 23, 1988, and subsequently the relief sought by the Petitioner was denied on May 8, 1989. Even before the Master issue evolved federal questions were raised before the assigned hearing panel by written motion on April 15, 1988 with respect to violation of due process concerning the failure to convene a "public hearing" on Formal Complaint ADB 25-88 within the prescribed and mandated 56 day rule of MCR 9.111 (B). The panel assigned to hear the matter on the Petitioner's Motion To Dismiss did not rule on this dispositive motion, but instead, on October 27, 1988, entered its Order taking the motion under

advisement. The panel never issued any adjudication on this motion even though the panel subsequently issued its Report and Order of Revocation. Thus, the panel did not address the due process issue raised by the Petitioner which it purportedly had taken under advisement back on October 27, 1988. Each of the foregoing federal questions were presented to the Board on review, including the additional federal questions concerning (1) the unconstitutionality of the Michigan scheme of attorney discipline, (2) the alteration of evidence secured secretly by the Respondent during the Pre-Formal Complaint stage by subpoena issued by the Respondent and not the Board, (3) the denial of a fair trial where unexcised evidence was placed in the record even though the Master had ordered its excision, (4) the improvident and proscribed act of the Board's secretary consolidating the separate and distinct Formal Complaints that arose out of separate events and transactions, (5) the denial of access to the minutes of the

Board and the list from which the Master was selected or appointed, (6) the deprivation of procedural due process where misconduct was found on substantive charges not contained in the Formal Complaints which likewise impacted on the extreme punishment imposed, and (7) the Board's conclusions of law denied the Petitioner equal protection and due process since such conclusions were actually not the applicable law in Michigan at the time the events complained of occurred. The Board, other than reducing the Order of Revocation to a three (3) year suspension of the Petitioner, upheld all actions of the Master, Panel #11 and itself. All of these federal questions discussed above were raised in Petitioner's Application For Leave To Appeal to the Michigan Supreme Court. However, since the Michigan Supreme Court would not hear the case, the federal questions raised throughout the proceedings below became final without judicial intervention.

For example, the Master ordered the Pro-

secution, with respect to the Prosecution's proposed Exhibit "56", "to excise or white out or cut out all comments other than those made by" the Petitioner. (Tr.967) Master Kaplan in ruling on Petitioner's objection to the Prosecutor's proposed Exhibit "56" pointedly stated:

> "MASTER KAPLAN: It's the ruling of the Master, Mr. Campbell, that your motion -- your objection is sustained except for statements made by you that are memorialized in the report.
>
> In fairness to you, I want the report excised, because although I would promise you not to the read the report I don't think it should be in the record as to comments made by other people." [Emphasis Added] (Tr.968)

For another example, on August 29, 1988 the Respondent filed with the Board and served Petitioner with a Motion entitled: Commission's Request For Admission Of Documents, and citing in support thereof "MCR 2.302 (A)". This instant motion was argued on September 7, 1988, and taken under advisement with Panel #11's decision being rendered on October 27, 1988 via a written Order.

Petitioner, of course, objected this

allowance of discovery permitted outside of MCR 9.115(F)(4)(a)-(c).

On or about August 29, 1988 when the Respondent filed the Request For Admission of Documents, Respondent cited as authority for such request MCR 2.302(A). Rule 2.302(A) involves the "availability of discovery" under the Rules of Civil Procedure.

The Respondent's reliance on, and Panel #11's and the Board's allowance of discovery of this nature is clear error. Moreover, MCR 9.115(A) states, in its pertinent part:

> "(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel." [Emphasis Supplied]

Thus, MCR 2.302(A) does not "apply to a proceeding before a hearing panel", because discovery is "otherwise provided in" MCR 9.115(F)(4) which pointedly is extremely limited to the parties in misconduct proceedings under Chapter 9, Subchapter 9.100 et seq., and which states:

"**(4) Discovery.** Pretrial or discovery proceedings are not permitted, except as follows:" [Emphasis Supplied]

It should be also noted that while MCR 9.115(F)(d) permits a panel to hold a pre-hearing conference "to obtain admissions" or narrow the issues, such authority does not open a proceeding under MCR 9.100 et seq. to discovery provided for Subchapter 2.300 [i.e. MCR 2.301 through MCR 2.316].

Again we have utilized in these sort of proceedings a double-standard which denies equal protection of law.

Panel #11 under its Order dated October 27, 1988 granted discovery under MCR 2.302(A) or MCR 2.312, as the case may be, notwithstanding such discovery is proscribed under the plain reading of MCR 9.115(F)(4) made applicable through MCR 9.115(A).

What Panel #11 and the Board has created in its application of MCR 2.302 (A) or MCR 2.312 is to expand the limited scope of MCR 9.115(F)(4) in favor of the Respondent, and in so doing provide a subordinate form of

discovery to a Petitioner attorney. The Fourteenth Amendment, which became law in 1869, was enacted to control such creations by those acting under color of state law, and put some teeth in the Thirteenth Amendment enacted in 1866. Put simply, the Petitioner was, given the expansive grant of discovery under the sponsorship of MCR 9.115(F)(4) extended to the Respondent, denied equal protection of the law and unequal discovery opportunities. This should be halted by this Court.

Equal protection includes the premise that persons subject to the law be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. Marchant -vs- Penns. Ry. Company, 153 U.S. 380 (1894) This second class right to discovery given to Petitioner attorneys should be nullified and not permitted to stand by this Court.

For another example, on January 9, 1989 the Petitioner went to the offices of the Attorney Discipline and requested copies of

the following materials under the authority of MCR 9.126; to wit:

(A) Written request from Panel #11 Chairman, David I. Rosin;

(B) Minutes of the Board underlying the David I. Rosin request and the Board's vote thereon; and

(C) The Master's List from which the instant appointment was made.

Petitioner was given a copy of the "written request from David I. Rosin" which was dated "filed" with the Board on October 11, 1988, but the Board's staff, on January 9, 1989, indicated that the minutes of the Board are not given out to a Petitioner, and the Master's List request had to be addressed by the John F. VanBolt, the Board's Executive Director and General Counsel.[1]

The "exclusive constitutional responsibility" [MCR 9.110 (A)] ought not be subject

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[1] It is to be noted that the delegation request was made even before the entry of Panel #11's adjudication dated October 27, 1988. Further, a copy of this missive was not served upon the parties.

to politicking or simple flight from responsibility by a panel because "factual issues are quite complex" [Rosin's letter dated October 11, 1988] and thereby the establishment of a procedural hearing scheme not expressly authorized by Court Rule, and where the minutes and list from which a a master is appointed is unavailable to a Petitioner attorney when demanded. cf. Batson -vs- Kentucky, 476 U.S. 79; 90 L.Ed.2d.69 (1986) [exclusion of all members of a defendant's race, on the basis of race, is a denial of equal protection]. The arbitrary ouster of representative Black attorneys serving as masters could not be checked by the Petitioner without access to the list of Masters. Such lists formerly were published in the Michigan Bar Journal [See, e.g. the July 1980 Issue, pp. 458-459. This denial of access of such a list is akin to a defendant not being able to see the jury sheets or records before they are seated to pass judgment on an accused party.

The principal rule enunciated in Batson

-vs- Kentucky, 476 U.S.79 (1986) has been extended to include civil actions. The 7th U.S. Circuit Court of Appeals on December 12, 1990 became the second Circuit to extend Batson -vs- Kentucky, supra, to civil litigation. Dunham -vs- Frank's Nursery & Crafts, Inc., 89-2109. State action is rather obvious in a disciplinary proceeding in Michigan - the prosecutor-Respondent, representing the State as the prosecutorial arm. The Board's action in refusing to provide access to the Master's List effectively foreclosed any challenge by the defense as to the exclusion of all members of the Petitioner's race, on the basis of race. The Petitioner is Black and the Master is White.

It is also equally clear that "(i)ntegrity is the very breath of justice. Confidence in our law, our Courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice

a doubt or distrust of its integrity" Erwin M. Jennings Company -vs- DiGenova, 108 Conn 491, 499; 141 A. 866, 868 (1928). Within this context, it is a denial of due process and equal protection of the law to deny the Petitioner access to the minutes and the Master's List from which Steven M. Kaplan, was appointed.

The net result is that the checks and balances against unauthorized actions cannot possibly be discovered by a Petitioner to ensure due process itself against a backdrop of access being denied by Board fiat. See, e.g. Kent -vs- United States, 383 U.S. 541; 16 L.Ed.2d 84 (1966); In The Matter Of The Application Of Gault, 384 U.S.541; 16 L.Ed.2d 1013 (1966). Fundamental fairness and all notions of fair play to satisfy due process itself mandates such access and disclosures to the Petitioner.

Another clear example of the federal question being raised timely and properly raised so as to give this Honorable Court

jurisdiction [Sup.Ct.R. 14.1(h)] is concisely demonstrated as follows:

The Order discipline concluding Petitioner committed misconduct together with the punishment imposed was based on substantive separate and distinct charges not contained in the Formal Complaints, and further made conclusions of law constituting reversible error on substantive issues.

Hence, it is apparent that the punishment imposed on the Petitioner was predicated in part necessarily upon a finding of misconduct under "MCR 9.103(3)(4)(6)" with respect to Case No. 133-88.

No "MCR 9.103(3)(4)(6)" violation is alleged, for example, in Formal Complaint ADB 133-88, and secondly, no such Court rule itself even exists. An attorney may only be found guilty of misconduct as charge in the Complaint. In re Ruffalo, 390 U.S.544; 88 S.Ct.1222; 20 L.Ed.2d 117 (1968)

Hence, due process, on its face, is not satisfied where the discipline imposed gave

weight to such "finding and conclusions of the panel" [See, Opinion, Page 1, Para.4] in passing on the question of punishment of three (3) years.

Next, essentially the Respondent charges in its Formal Complaint that the Petitioner had a "duty", under DR 9-102(A), to deposit the proceeds, i.e. Seven Thousand Four Hundred Twenty Eight and 87/100 ($7,428.87) Dollars, into "a Trust Account". See, Count I, para J.(i).

Now going to the Respondent's contention that a violation of DR 9-102(A) has occurred; first one would have to totally ignore the client's wishes in the matter, i.e. don't put my money in your Trust Account for the issuance of a check for I want cash! In this regard, the Respondent's own witness, Ronald Karp, Esq., on July 10, 1989 testified pointedly that a Client may request cash instead of having a lawyer pass the client's proceeds through a Trust Account. Moreover, any reasonable assessment of DR 9-102 (A) would

clearly reflect that the Rule only applies "unless the Client otherwise directs". This condition has been codified in some states. See, e.g. Cal. Business and Professions Code, §6076 [west 1962] See, also Michigan Supreme Court Order of October 23, 1987 included such language to amend DR 9-102 and stated it would read:

> "(A) Unless the client directs otherwise, all funds of clients paid to a lawyer..... shall be deposited in an interesting-bearing account....." [Emphasis Added]*

Secondly, the Respondent's charge advanced under DR 9-102 (A) completely ignores also the fact the Wayne County Circuit Court, via Judge Dunn issued an Injunctive Order which, on its face, prevented the Petitioner from even delivering or turning the funds over to the client. See, Respondent's Exhibit #34. The Ex Parte Order, dated September 17, 1981 [Exhibit #34] pointedly prevented the changing

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* Note: This exception was written into Michigan law effective until October 1, 1990 [See, MRPC 1.15(b)]. Likewise after October 1, 190 [See, MRPC 1.15(b)] "...by agreement with client...."

of the status quo.[2]

Against this backdrop and the Court's Order the Respondent had asserted that the Petitioner should have run the risk of ignoring or possibly violating (not only the Client's directive of not wanting to be issued a check) the clear mandate of the Court's Order itself and "depositing the proceeds into a Trust Account" which neither Judge Dunn's Order or the Client herself authorized. To underscore the absurdity of such contention one only has to consider the fact that had the Petitioner "deposited the

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[2] "IT IS ORDERED that Plaintiff, SHIRLEY WRIGHT, be and she is hereby ENJOINED by this Court from negotiating or otherwise disposing of cashiers check no. 4780807, issued by National Bank of Detroit in the amount of $7,428.87, pending the further order of this Court;

* * *

IT IS FURTHER ORDERED that in the event that the aforementioned cashier's check has been negotiated by SHIRLEY WRIGHT and/or FLETCHER J. CAMPBELL, that they be and are ENJOINED from disposing of the proceeds from same pending the further order of this Court;" [Emphasis Added]

Note: This exception is written into Michigan Law [See, MRPC 1.15(b)]. "Except as...or otherwise permitted by law..."

proceeds into a Trust Account" against the wishes of the Client and Judge Dunn's Order then more than likely the Respondent would merely be heard to replace the alleged DR 9-102(A) violation with a charge being leveled against the Petitioner that he violated DR 7-106(A) [i.e. "a lawyer shall not disregard or advise his client to disregard a standing rule of a Tribunal....."] and DR 1-102(A)(1)(5)(6), inter alia.

Of course, the aforementioned circumstances do not even address the fact that Judge Dunn more than likely would have held the Petitioner in contempt which may have resulted in a fine, imprisonment or both; and such contempt proceedings may have been civil, criminal or both for violating his Order. See, e.g. Ex Parte Gilliland, 284 Mich 604; 280 NW 63 (1938), cert den 306 U.S. 643; 83 L.Ed. 1040; Harvey -vs- Lewis, 10 Mich App 709; 160 NW.2d. 391 (1968) [held contempts may be classed as civil or criminal].

In sum, no violation of DR 1-102(A)(1)

(3)-(6); DR 9-102(A) or (B)(4) occurs where a Petitioner-attorney, in compliance with a Court Order, maintains the status quo and not "pay or deliver to the Client....the funds" [DR 9-102(B)] which could constitute criminal or civil contempt or both for such mis-doings which affront the dignity of the Court. Jaikins -vs- Jaikins, 12 Mich App 115 (1968); Harvey -vs- Lewis, supra

Further it is clear, given the Ex Parte Order of the Circuit Court, that the proceeds of the garnishment could not be turned over to the Client. Also, DR 9-102(B)(1)-(4) had been followed at the direction of the Client. In short, the only duty owed in this matter under Count I was the Petitioner's client, Shirley Wright (hereinafter "Wright"). Her (Wright's) specific directions were adhered to, including obeying the Injunctive Order.

Next, Respondent alleges in Count II that a violation of DR 1-102(A)(4)-(6) has occurred. Hence it is certainly not "misconduct" described thereunder unless the Respondent can

prove that in fact the monies taken from the Trust and Payroll Accounts was Garnishment proceeds. In this regard it is to be noted that the Respondent has alleged that on September 16, 1981 only "cash" was received by the Petitioner; [See, para. K.(ii)] that in fact the Respondent has alleged that "Petitioner did not deposit said Seven Thousand Four Hundred Twenty Two and 87/100 ($7,422.87) Dollar check into a Trust Account" [See, para K.(i)] further clearly supports non-removal of funds.

In further, and a more clear, demonstration of the fact that the monies deposited by the Petitioner were not the proceeds of the Garnishee-Defendant NBD is pointedly reflected in one of the Respondent's own Exhibits itself given to Petitioner through discovery where a notation is made thereon by bank personnel which states:

> "checked bank's computer there wasn't an account in the name of Fletcher Campbell at the time above check was presented. "No deposit." Check had to have been "cashed" per Anthony Monales

NBD Security. 02-10-88 R.A." [Emphasis Added]

[See, Exhibit 78, in evidence]

Petitioner's testimony on this point, when coupled with the demonstrative evidence of the Respondent itself, reflects that the check was "cashed" and "no deposit" was made. Weighing this trial evidence, as the Master must under a MCR 2.504(B)(2) Motion, it follows that the allegations contained under paragraph K.(iii), (iv), (vi), (vii) and (viii) must fail for failure of the Respondent to meet its burden of proof.

The burden of proof rests with the Respondent in these proceedings. That is to say that the Respondent has the burden of proof to establish by competent evidence which out weights the evidence against it. Strand -vs- C & W.M. Ry Company, 67 Mich 380 (1887); Hanna -vs- McClave, 273 Mich 571 (1935); Cook -vs- Vineyard, 291 Mich 375 (1939)

Further, this burden never shifts to the Petitioner. Weaver -vs- Motor Transit Management Company, 252 Mich 64 (1930); A.J.Brown &

Son, Inc. -vs- City of Grand Rapids, 265 Mich 465 (1933)

Hence, the Respondent in the instant case had the burden of proof on all the elements of its case. School District of the City of Ionia -vs- Dadd, 380 Mich 220 (1944); Rogers -vs- City of Detroit, 340 Mich 291 (1954)

In short, allegations of mere conclusions are not sufficient to save a pleading from dismissal on proper Motion. Plassy -vs- S. Loewenstein & Son, 330 Mich 525, 527 (1951); MCR 2.504(B)(2)

Further, in terms of the subsidiary federal questions raised, the Respondent had steadfastly contended, through its witness, Mary H. Sanders, that Petitioner deposited the Cashier's Check [Exhibit "78"] into two (2) different checking accounts, with a balance of One Thousand Sixteen ($1,016.00) Dollars being given to Petitioner in cash. On the other hand, Petitioner had steadfastly contended that he and his client admittedly cashed the $7,428.87 Cashier's Check [Exhibit

"78] on September 16, 1981 and received all of the $7,428.87 which was thereafter held in the Petitioner's office safe because of the issuance of a Temporary Restraining Order by Judge Dunn preventing the money being disposed of or given to Mrs. Wright, the Petitioner's client, and maintained the status quo until permitted to disburse funds.

Moreover, the record in this cause reflects the following exchange between defense counsel and witness Sanders on the foregoing point which went as follows: [Tr.1238]

A CL does not mean collection, it means check link.

Q Check link.
What does it -- what's the distinction between a person receiving a receipt that says CL as opposed to a cash deposit?

A Okay.
CL means -- that means you are linking that deposit up to the check.

Q Okay.
Let's go to -- now, let's say I gave you cash, what would it say?

A It would just say credit.

Q Credit.
Now, what, what -- so --

A CR.

Q CR?

A Um-hmm.

Q Now I noticed -- do you have copies of the receipt that you gave the customer back on September the 16th, 1981 which would show us whether or not it was a CL deposit as opposed to a CR credit deposit?

A Mr. Campbell, we don't keep copies of those blue birds.

The so-called "Blue Birds" testified to by Ms. Sanders and issued by the Nation Bank of Detroit is attached hereto covering on the $3,583.89 deposit of September 16, 1981 [See, Exhibit "A", Transcript Receipt] [App.161], and it clearly shows that the deposit resulted from the depositor giving "cash" by the designation of "CR" thereon as clearly distinguishable from a "Check Link" or "CL" deposit as Ms. Sanders' oral testimony provided in impeaching the banks own subpoenaed business records.

Moreover, the Board was in possession of new and material evidence that ought to have caused the Board to Re-open and reconsider its Opinion and Order Reducing Discipline, or if the Board believed that additional testi-

mony should be taken, it should have referred the case to a hearing panel or master. MCR 9.118(C)(2). This Court ought not ignore this evidence in passing upon the Petitioner's practice of law. MRE 103(d)

Another subsidiary issue concerns the fact that a $600.00 retainer fee was indeed collected in connection with this Petitioner's retention in instituting Court action for (1) Appointment of Guardian and (2) Appointment of Conservator, both separate and distinct proceedings under Michigan Statutes and Court Rules. The finding for misconduct on this aspect is neither supported by the caselaw, statutes or Court rules governing attorneys in Michigan at the time of its occurrence. As a matter of fact the state's expert witness John Vonbatchelder, an attorney in the state of Michigan for over fifty (50) years, testified pointedly that he was of the opinion that the $600.00 retainer fee paid to this Petitioner was proper, and, even more importantly, that charging a retainer

fee in a probate matter does not violate any disciplinary rule [Tr.683, 736]. Petitioner, as well as Mason's counsel Mr. Auslander, both testified that contingent fees are not prohibited in probate matters [Tr. 428, 429; Tr. 430; Tr.232] Additionally, it must be noted that back in September 1983 when this Petitioner was retained to render the aforesaid legal services the Michigan Appellate Court itself recognized that it was not then readily clear whether a fiduciary may pay an attorney's fee prior to Court approval. This unclearness that prevailed then was pointedly expressed in the 1984 Michigan Appellate Court decision of In Re Thacker Estate, 137 Mich App 253 (1984) where the Court stated:

> "The plain language of the provision (MCLA 700. 541; MSA 27.5541) requires judicial approval before the fiduciary may take its initial payment. Thus, appellant (fiduciary) erred in paying itself without Court approval. [Emphasis Added]
>
> It is not as readily apparent whether the fudiciary may pay an attorney's fee prior to Court approval. The statute merely states that counsel may be retained without Court approval and shall receive reasonable compensation for his

> services. However, PCR 707.1(d)(2) requires approval of attorney compensation to be sought pursuant to PCR 908. [Emphasis Added] 127 Mich App 253, 263 (1984)

To underscore the unclearness expressed by the Thacker Court with respect to payment of attorney's fees prior to Court approval, a May 27, 1987 Michigan Court of Appeals decision in footnote 2 of its opinion finally made the governing Court Rule clear where it pointedly stated:

> "2 MCR 8.303, formerly PCR 908.3, makes clear that the probate court must approve attorney fees in all cases." [Emphasis Added] Fletcher J. Campbell, J.D., P.C. -vs- Ophelia Mason, Docket No. 86326 (05-27-87) _____ Mich App _____ (1987)

In short, a new Court Rule was established effective January 25, 1985, i.e. MCR 8.303, to replace patently unclear and confusing meaning and guidance of the former PCR 908.3. Now MCR 8.303 requires Court approval of attorney fees even when the affected parties have consented. Against this backdrop the finding of misconduct on this aspect is inconsistent with the law itself and denied this

Petitioner due process. It is also most important to note that the Probate Court did subsequently approve the $600.00 fee upon which the supposed misconduct was predicated in accordance with In Re L'Esperance Estate, 131 Mich App 496; 502; 346 NW2d.578 (1984), cited in Fletcher J. Campbell, J.D., P.C. -vs- Ophelia Mason, [Ex #19], where its stated:

> "Hence, although a conservator may hire an attorney and may agree to pay a certain fee, the attorney's fee is clearly subject to the probate court's scrutiny and may, in fact, be altered by the probate court."

Put simply, the $600.00 fee was agreed upon between the parties, paid, and then subsequently approved by the Probate Court. There certainly is no misconduct here properly supported by the law objectively when applied to the record in this cause if read by those charged with reviewing same.

Another issue raised concerns the Board's issuing formal complaint alleged, under Count II, para.C(ii), that a "Contingent Fee Contract For Services" was entered into between this Petitioner and his client, Mason, and this action violated a disciplinary Rule. In short, the formal complaint had alleged that (1) a contingent fee contract in a probate case is prohibited and (2) the fee charged is under such contract is "clearly excessive". This simply is not the law.

Moreover, assuming the truth of such allegation for the purpose of considering a dispositive exposition of the caselaw and court rules, as we must, under Michigan law [MCR 2.116(C)(8); MCR 2.504(B)(2)]; Davis -vs- Kramer Brothers Freight Lines, 361 Mich 371, 376(1960); DeNike -vs- County of Otsego, 45 Mich App 711, 714 (1973)], nevertheless the applicable disciplinary rule [DR 2-106 (C)] and Michigan Court Rule [formerly GCR, 1963, 928 now MCR 8.121] on their face is inopposite to the position taken under the formal com-

plaint and covering on such matters.

Moreover, DR 2-106(C) pointedly sets forth the types of agreements which are proscribed wherein it says:

> "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a divorce case or for representing a Defendant in a criminal case." [Emphasis Supplied]

Needless to say, probate matters are not included under DR 2-106(C). Substantively, there is no violation where no disciplinary rule exists prohibiting such retention as alleged by the formal complaint in Court II via a "Contingent Fee Contract".

Also it was the Board's finding that the Contingent Fee Contract was "clearly excessive". Again as a matter of law such allegation must fail because the substantive law is inopposite. Moreover, MCR 8.121 indeed permits an attorney to enter into a "Contingent Fee Agreement" with a "maximum allowable fee ...(of) one-third (1/3)". See, MCR 8.121 (B) No other Court Rule outlining and defining a "contingent fee" contract exists.

On considering the evidence introduced at this trial the Fiduciary herself testified as to the assets of the estate when (1) she stated that the stock sold by her through her broker, Comerica-Bank-Detroit, exceeded Two Hundred Thousand ($200,000.00) Dollars, (2) she had also money in bank [see, Exhibit #49 in evidence], and (3) she obtained in August 1984 proceeds of the ward from the safe/vault [see, Exhibits #50 and 51, in evidence]. Hardly can any set of facts adduced by the proofs in the underlying record evidence a receipt by this Petitioner of an amount which violates MCR 8.121(B) of one-third (1/3) allowable to an attorney.

More significantly, it must be noted that testimony or proofs on the amount of assets of the estate came from (1) the Petitioner's testimony under the adverse party statute upon questioning by, the Respondent's counsel, (2) Exhibit No's 49, 50 and 51, and (3) the Fiduciary's testimony wherein she stated stock sold through her broker/bank was Two Hundred Thou-

sand ($200,000) Dollars or more, coupled with that secured by her in August 1984 from the safe/vault. Further, when the Prosecution's expert was asked how much and what were the total assets of the estate he (i.e. John Von Batchelder) testified that he did not know in contrast to the Petitioner's adverse party testimony that the assets exceeded One Million ($1,000,000.00) Dollars. It seems hardly fitting, given this "proof", that the Petitioner had contracted under a "Contingent Fee" arrangement for more than one-third (1/3). Exhibit #8 shows otherwise. Likewise, Sixty Six Thousand Eight Hundred Thirty Six and 17/100 ($66,836.17) Dollars, plus One Thousand Three Hundred Fifty Seven ($1,357.00) Dollars can hardly be said, as a matter of fact or law, to be more than the 33-1/3 set forth in Exhibit #8 itself, or more than 33-1/3 of over the excess of the one million ($1,000,000.00) dollar estate that was subsequently established on the record. Likewise, Mason testified that after she was appointed Guardian-Conser-

vator, and with the assistance of Petitioner, she was able to locate a safety deposit box that had been removed from a closed bank (Tr. 1091). Mason readily admits that the contents of the located safety deposit box was worth at least one million dollars (Tr.625) (Ex. 51).

In sum, the Board's adopted finding on this aspect against the backdrop of the right and legal application of DR 2.106(C) and MCR 8.121, left the Petitioner entitled to a Dismissal, when coupled with the Petitioner's testimony itself of the services performed [See, Exhibit #73] which was not refuted by the Prosecution.[3]

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[3] It should be noted that the claim that the payment under the first contract of $1,357 [Ex.#1] constituted misconduct under DR 2-106(A) and (B) is wholly without merit since both the Probate Court and the Michigan Court of Appeals approved the payment of such sums to this Petitioner. The alleged misconduct with respect to "contingent fee" contract [Ex.#8] is governed by DR 2-106(C) and MCR 8.121 at most, and no DR 2-106(C) violation was alleged in the Board's Formal Complaint with respect to the second contract, i.e. Exhibit #8. See, also, In The Matter Of John Ruffalo, Jr., Supra.

Another federal question; essentially under the Count III, of the Board's Complaint contends that apparently some "Order" or "Opinion" of the Court of Appeals had not been obeyed by the Petitioner.

For the claimed substantive charge(s) under this Count III, the Prosecution contended DR 1-102(A)(1)(5)(6) and DR 7-106(A) had been violated.

The DR cited by the Prosecution in the Board's Formal Complaint and conclusions state:

DR 7.106. Trial Conduct

> (A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

Hence, even if its assumed that the Court of Appeals is a "Trial" Court or "Tribunal" within the meaning of DR 7-106(A), which is vehemently denied, nevertheless there still has been no violation of the Court of Appeals Order dated May 27, 1987 because the Order itself does not mandate the Petitioner to do anything, but pointedly states in its charging mandate/adjudication that the matter is:

> "Reversed and remanded for proceedings consistent with this opinion. Costs to Appellee-Cross Appellant." [Emphasis Added]

In short, the Order remands the matter back to the Trial Court, i.e. Probate Court, "for proceedings....". The Prosecution had not in any fashion presented competent "proofs", by preponderation or otherwise, that the Petitioner had not obeyed "all Orders of the Court of Appeals", for the Order speaks for itself.

Moreover, Courts do not speak through their opinions but through their Orders, Judgments and Decrees. Jones -vs- Hicks, 358 Mich 474; 100 N.W.2d 243 (1960); Pierson -vs- Pierson, 351 Mich 637; 88 N.W.2d 500 (1958); Nemes -vs- Smith, 37 Mich App 124; 194 N.W.2d 440 (1971). An opinion by a Court is merely evidence of the law, and not the law. See, C.J.S., Courts §222. Thus, a Court's adjudication, and not the language of the writer of the opinion, establishes the "law of the case". Attorney General ex Rel. O'Hara -vs- Montgomery, 275 Mich 504; 267 N.W.550 (1936)

In sum, there had not been a proper invocation of the Trial Court's jurisdiction after the

entry of the May 27, 1987 adjudication pointedly reversing and remanding the matter back to the Trial Court "for proceedings..." in the case. Put simply, the mandate of the Court of Appeals is directed not to the Petitioner, but to the Trial Court. Hence, no failure to obey within the ambit of DR 7-106(A) as matter of fact or law. Lastly, no Order had been entered by the Trial Court effectuating the Court of Appeals' opinion as required. MCR 7.215(F) ["execution on its Judgement is to be obtained or enforcement proceedings had in the Trial Court" after the record has been returned under MCR 7.210(I) and (J)].

It is to be noted that the Prosecution presented absolutely no proof that subrule 7.210(J) had been complied with after the Court of Appeals was decision was issued on May 27, 1987. MCR 7.210(J) states:

> "**(J) Notice by Trial Court or Tribunal Clerk.** The trial court or tribunal clerk shall promptly notify all parties of the return of the record in order that they may take the appropriate action in the trial court or tribunal under the Court

of Appeals mandate." [Emphasis Added] [Amended effective October 1, 1989.]

This the trial Court had failed to do. See, also United States -vs- Covino, 837 F.2d. 65 (CA 2, 1988), and People -vs- Johnson, 397 Mich 868 (1976)

Thus while under MCR 7.215(E) "an opinion is notice of the entry of the judgement of the Court of Appeals", nevertheless under the Court Rules it is perfectly clear the Court did not Order the Petitioner to do anything for its mandate was directed to the trial Court.

Put simply, the Order of the Appeals Court merely remanded the case back to the Probate Court with any enforcement [of this "money judgement", see, slip op. p.8(5-27-87) Court of Appeals] [Ex. #19] necessarily abiding the action of the trial Court. The Prosecution presented absolutely no evidence of trial Court action after remand until after the Master's decision, which was adopted by

the Board, had been rendered.[4]

In conclusion, when the alleged misconduct violations were found under Count III of the Board's Formal Complaint by the Master, there existed absolutely no "Order and opinion of the Michigan Court of Appeals directing [Petitioner] to reimburse the estate for the excessive fees". The Master in his findings conceded this in his conclusion where he pointedly, in its pertinent part, stated:

> "Conclusion: Respondent [Petitioner] disregarded the Order of the Michigan Court of Appeals, which **indirectly** [not "directly"] ordered him to return the excessive fees to the Estate." [Emphasis Added as well as bracketed words.]

Likewise, it is to be noted that the Master and Board has now decreed that indirect orders, whatever they are, should guide an attorney's ability to practice law in the state of Michigan. This is clearly a depar-

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[4] The Amended Order of the trial Court in the underlying Case #763-105 was not even in evidence on November 10, 1989 when the Report Of The Master was issued with respect to page 10 of Count III of the Formal Complaint and its alleged violations.

ture from the due process requirements mandated by the United States Supreme Court in The Matter of John Ruffalo, supra. The Court of Appeals Order [Exhibit #19] simply does not say what the Master or the Board found on this aspect yet the Petitioner was suspended for thirty-six (36) months as a part of such punishment to such non-existent Order or on such an indirect order.

In another federal question; essentially the Board's Formal Complaint under Count IV, contended that the Probate Court entered an Order restraining the Petitioner from disposing of or transferring assets in his possession, as distinct from a non-named party, which purportedly belonged to the estate. This temporary restraining Order was dated January 31, 1985 [Exhibit #17]. The underlying funds in question were issued to Petitioner only by a check dated December 5, 1984 [Exhibit #11]. The evidence adduced at trial shows that the check [Exhibit #11] was cashed by the Petitioner at the Estate's bank.

In reaching its conclusion that the Petitioner violated a temporary Restraining Order the Board adopted the Master's finding that purportedly:

> "4. The record shows that the $9,000.00 was part of a $55,836.17 deposit made by Respondent [Petitioner] on December 5, 1984, at Comerica Bank-Detroit (Ex 12). The deposit was generated by the $66,832.17 check (Ex 11) that Respondent [Petitioner] requested and received from the Estate's conservator Ophelia Mason, on December 5, 1984.
>
> CONCLUSION: Respondent [Petitioner] knowingly violated an Order of the Probate Court by transferring funds on February 1, 1985, that he received from Bessie Irwin's Estate."

This aforesaid finding and conclusion is totally inconsistent with a finding and conclusion made by the Master and the Board with respect to Count V of the Formal Complaint regarding the accounting given to the Probate Court by the Petitioner back in September 1986 with respect to the "Estate's funds" [Exhibit #14] wherein no misconduct was found, when coupled with the fact that the Master and the Board totally ignored the other deposits made to the account before February 1, 1985 which

were not so-called estate funds and its impact accounting-wise on its computations in reaching a decision that the $9,000.00 withdrawn was a part of $55,836.17 as separate and distinct from other funds so deposited and the beginning balances deprived therefrom. Put simply, this wholly improper computation error was permitted to be ignored, even assuming that the Petitioner was served with the TRO, where absolutely no distinction was made or justified with respect to other deposits in question [either prior to December 5, 1984 and before February 1, 1985] and its impact on the appropriate beginning balances.

Moreover, the conclusion and finding under Count IV of the Formal Complaint is wholly inconsistent with the conclusion and finding under Count V. The conclusions returned with respect to Counts IV and V are incapable of logical reconciliation and cannot be sustained. See, e.g. Hughes -vs- United States, 95 F.2d.538, (CA 5 Fla.(1938) dictum); People -vs- Chambers, 22 Cal App 2d. 687; 72

P.2d.746 (1937); Smith -vs- State, 38 GA. App. 366; 143 SE 927 (1928); Davis -vs- State, 43 GA App 122; 157 SE 888 (1931); Finch -vs- State, 87 GA App 426; 74 SE 2d 121 (1953) It is generally understood that "inconsistency" means some logical impossibility or improbability implicit in the findings on the several Counts at the same time. It ordinarily arises from factual considerations, as in the case at bar, where the Board found, via the Master, that the Petitioner transferred funds on February 1, 1985 that he received from the Estate [Count IV], but under Count V that Petitioner did not make false statements to the same Probate Court with respect to the disposition of the same estate funds through a Court ordered accounting [Exhibit #14]. There simply is no rational consistency to these opposite conclusions dealing with the same funds themselves. With respect to Count V the Master observed as follows:

> "1. On September 10, 1986, Respondent [Petitioner] was ordered by the Probate Court to account for the money received

from the Irwin Estate.

2. Respondent [Petitioner] filed an accounting on September 23, 1986."

The observation of the Master went on to state as follows:

"5. Respondent [Petitioner] did not meet its burden of disproving Petitioner's [Petitioner's] claim that he made cash payments totaling $31,500.00 to Love, Rickenbacker, and the State of Michigan with funds he gained from the Irwin Estate.

CONCLUSION: Respondent [Petitioner] did not make any material misstatements to the Probate Court in his accounting of September 23, 1986."

This is diametrically opposite to the Master's own finding of fact and conclusions of law as to Count IV of the Complaint.

After the substitution of Mr. Auslander as attorney for Ms. Mason as guardian and conservator of the Irwin Estate, the Court ordered Petitioner to give an accounting for the disposition of the $66,832.17 he received in fees from the Irwin Estate. This accounting was filed with the Court in September of 1986 (Ex.14). In Count V of the Complaint Petitioner was charged with making false statements to the Court with regards to the disposition of the $66,832.17. The

Master found:

> "CONCLUSION: Respondent [Petitioner] did not make any material misstatements to the Probate Court in his accounting of September 23, 1986."

This accounting sets forth that by January of 1985 all funds received from the Irwin Estate had been disposed of by Petitioner. In fact a capitulation of the accounting discloses expenditures of $66,919.11 some $86.94 more than he received in fees.[5]

However in his finding of fact as to Count IV the Master concludes that a withdrawal of $9,000.00 by Petitioner from his bank account on February 1, 1985 constituted part of the $66,832.17 received from Irwin's Estate.

These finding are incompatible. The Master's finding that Petitioner did not mis-

---

[5] It should be noted that the Court of Appeals held in effect that in absence of a better accounting by Campbell an estimated fee of $1,657.00 was reasonable (Ex.19). However, in the herein de novo hearing the Master made no independent assay of the proof. (Ex.73) See, In Re Ruffalo, Jr., supra, MSEA -vs- Department of Mental Health, 120 Mich App 42 (1982)

represent to the Court his disposition of the Irwin fees establishes that all such fees were spent as of January 19, 1985, (Ex.14). If they were spent in January 1985 they could not be present in February 1985. In addition the Master ignores the funds, allegedly a part of the Irwin fees, were deposited, as well as subsequent deposits made that month of January 1985 and the beginning balance on December 5, 1984. In short the Master's conclusion that Petitioner's accounting was not a misrepresentation establishes that he could not have violated the Court's Order on February 1, 1985 as all of the Irwin Estate funds had been spent, (Ex.14).

Put simply, the inconsistency in the conclusions and findings of Counts IV and V cannot be reconciled logically with each other. Speiller -vs- United States, 31 F.2d 682 (CA 3 Pa., 1929); likewise the following set forth jurisdictions, including California, adopts this view; to wit: **Cal**-- People -vs- Kimmerle, (1928) 90 Cal App 186, 265 P 525 (recognizing

rule); People -vs- Walther, (1938) 27 Cal App 2d 583, 81 P2d 452; People -vs- Doxie (1939) 34 Call App 2d 511, 93 P2d 1068; People -vs- Grant (1951) 105 Cal App 2d 347, 233 P2d 660 (dicta); People -vs- Tophia (1959) 167 Cal App 2d 39, 334 P2d 133. **Colo** -- Webb -vs- People (1927) 83 Colo 1, 262 P 906, ovrld Crane -vs- People, 91 Colo 21, 11 P2d 567. **Ga** -- Evans -vs- State (1932) 46 Ga App 39, 166 SE 449 (recognizing rule); Hand -vs- State (1954) 90 Ga App 452, 83 SW2d 276. **Ill** -- People -vs- Bailey (1945) 391 Ill 149, 62 NE2d 796 (recognizing rule).

The majority view is that verdicts respecting the several Counts of a Complaint such as used in the instant case must be consistent. The acquittal under Count V negates wholly the essential elements of misconduct charged in Count IV which was against the Petitioner. See, for example, the following cases; to wit: **US** -- Rosenthal -vs- United States (1921, CA9 Cal) 276 F 714. **Ariz** -- State -vs- Fling (1949) 69 Ariz 94, 210 P2d

221; State -vs- Laney (1954) 78 Ariz 19, 274 P2d 838. **Cal** -- Ex parte Johnston (1935) 3 Cal 2d 32, 43 P2d 541. People -vs- Powell (1920) 50 Cal App 436, 195 P 456; People -vs- Andursky (1925) 75 Cal App 16, 241 P 591; People -vs- Novo (1936) 12 Cal App 2d 525, 55 P2d 915, reh den 12 Call App 2d 529, 56 P2d 560; People -vs- Hight (1949) 94 Cal App 2d 100, 210 P2d 270. **Fla**-- State -vs- Trafficante (1961, Fla App) 136 So 2d 264 (apparently recognizing rule). **Mo** -- State -vs- Headrick (1904) 179 Mo 300, 78 SW 630. **Pa** -- Commonwealth -vs- Fronheiser (1925) 6 Pa D & C 710, 11 Leh Co LJ 209, 39 York Leg Rec 135. **Wash** -- State -vs- O'Neil (1946) 24 Wash 2d 802, 167 P2d 471.

Put another way, eliminating the evidence necessary to prove Count V, the remaining evidence is also insufficient to support Count IV. Boyle -vs- United States, 22 F2d. 547 (CA 8 Neb., 1927); Speiller -vs- United States, supra; People -vs- Bales, 74 Cal App 2d 732; 169 P 2d 262 (1946).

In conclusion the repugnancy is quite evident in the verdict of the Master and Board under Counts IV and V.

NATIONAL BANK OF DETROIT

TRANSACTION RECEIPT

(The white lettering indicates information for customer records)

FIRST LINE SHOWS: Bank–Branch–Teller, Process Date, Transaction Code

032-072-10 09/16/81 ( ) TC-01
DDA 86187-44 3,583.89 CR 0622

SECOND LINE SHOWS: Sequence No.

NBD 1771-10 REV. 10/80 (Code Definitions on Reverse Side.)

Exhibit A

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
OCT 16 1991
OFFICE OF THE CLERK

(3)

Case No. 91-433

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

FLETCHER J. CAMPBELL,

Petitioner,

vs.

**GRIEVANCE ADMINISTRATOR,
STATE OF MICHIGAN
ATTORNEY GRIEVANCE COMMISSION,**

Respondent.

Petition For Writ of
Certiorari To The
Michigan Supreme Court

RESPONDENT MICHIGAN ATTORNEY GRIEVANCE COMMISSION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

and

APPENDIX

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91-1

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE MICHIGAN ATTORNEY DISCIPLINE BOARD AND HEARING PANEL PROPERLY EXERCISED THEIR AUTHORITY IN IMPOSING DISCIPLINE IN THIS CASE?

II. WHETHER THE MICHIGAN ATTORNEY DISCIPLINE BOARD AND THE MICHIGAN SUPREME COURT ERRED IN DENYING PETITIONER'S REQUEST FOR RELIEF FROM THE ORDER OF DISCIPLINE IMPOSED IN THIS CASE?

III. WHETHER THE MICHIGAN ATTORNEY DISCIPLINE BOARD ERRED IN IMPOSING A THREE YEAR SUSPENSION OF PETITIONER'S LICENSE TO PRACTICE LAW?

TABLE OF CONTENTS

Counterstatement of Questions Presented.....i

Index of Authorities.....iv

Statement of Objections to Jurisdiction.....1

Counterstatement of Facts.....3

Argument.....17

I. THE MICHIGAN ATTORNEY DISCIPLINE BOARD AND HEARING PANEL PROPERLY EXERCISED THEIR AUTHORITY IN IMPOSING DISCIPLINE IN THIS CASE.....17

II. THE MICHIGAN ATTORNEY DISCIPLINE BOARD AND THE MICHIGAN SUPREME COURT DID NOT ERR IN DENYING PETITIONER'S REQUEST FOR RELIEF FROM THE ORDER OF DISCIPLINE IMPOSED IN THIS CASE.....24

III. THE MICHIGAN ATTORNEY DISCIPLINE BOARD DID NOT ERR IN IMPOSING A THREE YEAR SUSPENSION OF PETITIONER'S LICENSE TO PRACTICE LAW.....48

Objection to Inclusion of Legal Argument in Petitioner's Appendix.....55

Conclusion.....57

Appendix.....Appdx.1-27

INDEX OF AUTHORITIES

Ayres v Hardaway,
303 Mich. 589, 6 N.W.2d 905.....20

Cohen v Cohen,
125 Mich. App. 206, 335 N.W.2d
661 (1983).....41

Erdmann v Stevens,
458 F.2d 1205 (2nd Cir. 1972).....19

Falk v State Bar of Michigan,
411 Mich. 63, 305 N.W.2d 201 (1981)...19

In re Anson,
730 P.2d 1229 (OR. 1986).....53

In re Harford,
282 Mich. 124, 275 N.W. 791 (1937)....20

In re Reback,
513 A.2d 226 (D.C. Ct. App. 1986).....53

In the Matter of Duffy,
697 P.2d 943 (N.M. 1985).....53

In the Matter of Mills, an Attorney,
1 Mich. 392 (1850)..... 20,53

In the Matter of Wilson,
409 A.2d 1153, (N.J. 1979).....52

Matter of Fernando Edwards,
No. 87328, Mich. Sp. Ct.
filed December 5, 1990.....22

Matter of Mary E. Gerish,
ADB 171-87 (1989).....53

Matter of Grimes,
414 Mich. 483, 326
N.W.2d 380 (1982).....19,23,50

Schlossberg v State Bar Grievance
Administrator, 388 Mich. 389, 200
N.W.2d 219 (1972).....20

State Bar Grievance Administrator
v Del Rio,
407 Mich. 336, 285 N.W.2d 277 (1979)..50

State Bar Grievance Administrator v
Donigan,
403 Mich. 172, 267 N.W.2d 909 (1978)..36

State Bar Grievance Administrator v
Grubbs,
396 Mich. 275, 240 N.W.2d 233 (1976)..47

State Bar Grievance Administrator v
Posler
393 Mich. 38, 222 N.W.2d 511 (1974)...36

State Bar of Michigan v
Baun (After Remand), 396 Mich. 421,
240 N.W.2d 728 (1976).....50,51

Wilson v Ex-Cello Corp.,
368 Mich. 61, 117 N.W.2d 1984 (1962)..39

COURT RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

Mich. Const. 1963, Art. VI, Sec. 5....18

Mich. Ct. Rule 2.505(A).....39

Mich. Ct. Rule 8.105(D).....38

Mich. Ct. Rule 9.100.....44

Mich. Ct. Rule 9.102.....44

Mich. Ct. Rule 9.102(A).....44

Mich. Ct. Rule 9.103(A).....41

Mich. Ct. Rule 9.106.....20

Mich. Ct. Rule 9.107(A).....21

Mich. Ct. Rule 9.108(A).....18

Mich. Ct. Rule 9.109.....19

Mich. Ct. Rule 9.109(C).....15

Mich. Ct. Rule 9.110(A).....19,23

Mich. Ct. Rule 9.110(D).....37

Mich. Ct. Rule 9.110(D)(3).....4,43

Mich. Ct. Rule 9.111(B).....33

Mich. Ct. Rule 9.114(C)(1).....26

Mich. Ct. Rule 9.115(A).....24,38

Mich. Ct. Rule 9.115(F)(1).....34

Mich. Ct. Rule 9.115(F)(4)(d).....28,35

Mich. Ct. Rule 9.115(G).....38

Mich. Ct. Rule 9.117.....4,42,43

Mich. Ct. Rule 9.126(C).....46

Mich. Ct. Rule 9.126(D).....46

Sup. Ct. R. 14.1(h).....55

Sup. Ct. R. 14.1(j).....56

Sup. Ct. R. 14.1(k).....55

Sup. Ct. R. 14.4.....56

Sup. Ct. R. 33.....56

STATEMENT OF OBJECTIONS TO JURISDICTION

The Attorney Grievance Commission denies that Petitioner has alleged sufficient jurisdictional grounds for the issuance of a Writ of Certiorari.

This Court's rules state that "review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only where there are special and important reasons therefore." Sup. Ct. R. 10.1.

The petition filed in this matter fails to satisfy this threshold requirement. It raises no constitutional questions of any import. Petitioner's references to constitutional provisions are just that -- references. He fails to fully discuss or explain how constitutional principles were violated as applied to the facts in this case. Nor is there any issue in the case involving the

construction or application of a federal statute. Neither the Michigan Attorney Discipline Board nor the Michigan Supreme Court have decided a federal question in a way that conflicts with a decision of another state court of last resort or a United States Court of Appeals. Nor has the court decided an important question of federal law which should be settled by this court or which conflicts with applicable decisions of this court.

Although Petitioner attempts to cast his arguments in constitutional terms, the Petitioner's claims of error do not involve constitutional questions but purely questions of state law and procedure concerning attorney disciplinary proceedings. Petitioner asks this court to substitute its judgment for that of the Michigan Supreme Court in determining how attorney disciplinary proceedings will be conducted. Petitioner has cited no basis for further review by this Court.

COUNTERSTATEMENT OF FACTS

A. Disciplinary Proceedings

On February 17, 1988 and May 25, 1988, the Michigan Attorney Grievance Commission, the agency authorized by the Michigan Supreme Court to investigate and prosecute allegations of attorney misconduct, filed a formal complaint against Petitioner, Fletcher J. Campbell, with the Michigan Attorney Discipline Board, the agency empowered to adjudicate allegations of misconduct. The complaints charged Petitioner with violating certain rules of professional responsibility. The cases, formal complaint ADB No. 25-88 and formal complaint ADB No. 133-88, were consolidated and assigned to a hearing

panel. After a pre-hearing conference, the panel concluded that the matter would proceed more expeditiously if a master were appointed to receive evidence and file a report with his findings and conclusions concerning the charges of misconduct. Mich. Ct. Rule 9.117. (Respondent's Appdx. pp. 26-27) Pursuant to the panel's request, the Michigan Attorney Discipline Board appointed a master on December 23, 1988. (Respondent's Appdx. pp. 6-9).

Petitioner objected to the appointment of a master. On February 17, 1989, an order was entered by the Board denying Petitioner's request for relief from the order appointing a master. (Respondent's Appdx. pp. 10-13). The Board determined that appointment of a master was not contrary to the powers and duties granted to it by Michigan Court Rule 9.110(D)(3).

The Mason Matter

In ADB No. 25-88 (hereafter referred to as the Mason matter), it was found that Petitioner charged clearly excessive fees and collected those fees without obtaining the prior approval of the probate court or the affected parties, and violated a restraining order issued by the court prohibiting Respondent from transferring or spending the monies he collected as fees.

The evidence established that on September 25, 1983, Petitioner was retained by Ophelia Mason to institute conservator and guardianship proceedings on behalf of her elderly neighbor, Bessie Irwin. A retainer agreement was signed. Pursuant to the agreement, Petitioner received a $600.00 "non-refundable" fee. Petitioner testified that the $600.00 was to cover all related out-of-court work necessitated by the probate proceedings.

For each court appearance, including the filing of court documents, he was to receive $350.00. Under this fee agreement, Petitioner was paid monies totaling $1,956.00.

Petitioner did not institute probate proceedings until April 26, 1984. The hearing on the guardianship and conservatorship petitions was held on June 26, 1984. Ophelia Mason was appointed as the guardian and conservator of Bessie Irwin.

After the hearing on June 26, 1984, Ms. Mason met with Petitioner at his office. At the meeting, Ms. Mason signed a document entitled "Power of Attorney and Assignment", (Ex. 8) which she testified that she did not understand. The "Power of Attorney and Assignment" provided:

1. An assignment of "monies being held by the Estate of Bessie Irwin" to Respondent;

2. A lien on the assets of the estate for an additional fee equal to one-third of any amounts received by the estate; and,

3. A "vested interest" in Respondent in amounts received by said estate, notwithstanding Mason's right to "seek or obtain other counsel to intercede in the Estate's behalf".

(Respondent's Appdx. pp. 1-5).

Petitioner testified that he asked Ms. Mason to sign the "Power of Attorney and Assignment" because the conditions under the original retainer had been fulfilled and because Ms. Mason claimed she could not afford his fees under that contract. Petitioner claimed he believed Ms. Irwin's assets to be $8,500.00, consisting of $4,000.00 in cash and a house valued at $4,500.00. However, Ms. Irwin's April, 1984 bank statement, offered by Petitioner, showed that she had $8,901.32 in her bank account alone.

On November 16, 1984, Comerica Bank Account No. 0371-05020-4, in the name of the Estate of Bessie Irwin, was opened. Ms. Mason testified that the account was opened at Petitioner's direction. It was into this non-interest bearing account that monies amounting to approximately $200,000.00 from the sale of securities belonging to Ms. Irwin were deposited.

On December 5, 1984, pursuant to the "Power of Attorney and Assignment", Petitioner charged and collected $66,836.17 from Ms. Mason by means of a check drawn on the Bessie Irwin account. The money came from the sale of the securities. This sum was in addition to the $1,956.00 previously collected from Ms. Mason. The monies Petitioner collected as his fees totaled $68,792.17. The fees were taken without the prior approval of the probate court as required by Michigan law.

On December 4, 1984, the same day the $66,836.17 check was received from Ms. Mason, Petitioner negotiated the check at Comerica Bank, which is shown by the back of the check. Petitioner's Statement of Services, filed with the probate court, reflects that Petitioner kept $11,000.00 in cash of the proceeds of the $66,836.17 check. The remaining $55,836.17 was deposited into his professional account entitled "FJC Attorneys Group PC", Account No. 0331-04296-0, which he maintained at Comerica Bank. Petitioner was the sole signator on the account.

Petitioner denied depositing the proceeds of the check into the account. However, the back of the $66,832.17 check references his account number. Further, the bank statement on his account shows a deposit on December 5, 1984 in the amount of $55,836.17.

On January 31, 1985, Petitioner was served personally with a temporary restraining order issued that date, restraining him from "transferring, spending, encumbering, or in any way disposing of" money from the estate of Bessie Irwin. On February 1, 1985, after being served with the restraining order, Petitioner withdrew the sum of $9,000.00 from his bank account where $55,836.17 of the proceeds of the $66,836.17 check had been deposited.

Petitioner remained an attorney of record in the Irwin estate until February 7, 1985. When an objection was made concerning Petitioner's fees, the probate court ordered Petitioner to reimburse the estate in the amount of $62,738.17.

Appeals were taken in the probate case. On May 27, 1987, the Michigan Court

of Appeals issued an opinion determining that Petitioner was entitled to fees and costs in the amount of $1,657.00 for services rendered in the Estate of Bessie Irwin. According to the opinion, Petitioner was to reimburse the estate the excessive fees. An order was entered on August 29, 1989, by the probate court compelling Petitioner to forthwith return $65,179.17, plus interest, to the estate. As of the conclusion of the disciplinary hearings in this matter, Petitioner had only returned $1,357.00 to the estate.

The Wright Matter

In ADB No. 133-88 (hereafter referred to as the Wright matter), it was found that Petitioner, 1) failed to deposit the funds collected on behalf of a client into an identifiable bank account; 2) misappropriated the funds of a client;

and, 3) knowingly provided false information to a volunteer investigator (legal counsel) assigned by the Attorney Grievance Commission to investigate a grievance filed against Petitioner.

Shirley A. Wright retained Petitioner to prosecute an insurance claim against the Group Insurance Company of Michigan for damages sustained in a fire loss. On March 10, 1976, a civil complaint was filed under the case name, Wright v Group Insurance Company in the Wayne County Circuit Court, State of Michigan. On June 11, 1981, a judgment was entered, awarding Wright $7,527.55. A subsequent order was entered decreasing the judgment to $7,428.87. The insurance company appealed the judgment.

On August 10, 1981, Petitioner instituted a garnishment action to collect

on the judgment rendered in Wright v National Bank of Detroit. On September 16, 1981, Petitioner endorsed and cashed a $7,428.87 check he received pursuant to a garnishment filed with the National Bank of Detroit. The check was made payable to the order of Shirley A. Wright and Petitioner and was later endorsed by both.

Petitioner negotiated the $7,428.87 check at his bank, the National Bank of Detroit. He did not deposit the check directly into a trust account as required by Michigan court rule. However, Petitioner, at some later time deposited $3,583.89 of the proceeds of said check into his Trust Account No. 0096187-44. A second deposit of $2,828.98 went into Petitioner's Office Payroll Account No. 086493-64. The remaining monies were kept by Petitioner as cash.

It was determined by the master and hearing panel that Petitioner misappropriated the money that was deposited into the trust and payroll accounts. By month's end, the balance in his trust account was $1,197.75, far lower than the amount to which Ms. Wright was entitled as recovery from the lawsuit. By the end of April, 1982, the balance in the trust account was $198.02. On September 17, 1981, the balance in Petitioner's payroll account was $1,221.66. By month's end, the balance was $383.45. Ms. Wright was not paid any money during this period.

The appeal in the civil case continued its passage through the court system. On September 19, 1986, following retrial, a judgment was again entered for Ms. Wright. Petitioner claimed fees of $2,933.85 and waived costs. On February 6, 1987, Ms. Wright received the sum of $4,734.30 from Petitioner.

On December 29, 1986, Ms. Wright filed a Request for Investigation against Petitioner with the Attorney Grievance Commission, alleging that Petitioner failed to remit the judgment proceeds.[1] The file was referred to volunteer investigator, Attorney Ronald Karp.[2] On April 13, 1987, Petitioner met with Mr. Karp. Mr. Karp testified that, at the meeting, Petitioner represented:

> That he held $7,428.87 in the form of cash from September, 1981 until disbursed to Wright in February, 1987, so that they would not be subject to garnishment.

---

1. A Request for Investigation is a complaint or grievance filed against an attorney.

2. The Grievance Administrator may appoint volunteer legal counsel to investigate allegations of professional misconduct. Mich. Ct. Rule 9.109(C).

On November 10, 1989, the master filed his report setting forth his findings on the charges. (Petitioner's Appdx. pp. 26-74) Neither party filed objections to the master's findings. On March 1, 1990, the panel filed its Report and Order. (Petitioner's Appdx. pp. 14-25) The panel adopted the master's report.

Petitioner was found to have charged and collected clearly excessive and illegal fees, failed to obey court orders, misappropriated client funds, and having made a false statement in connection with a disciplinary investigation in violation of the Michigan Rules of Professional Responsibility. Based on these findings, the hearing panel revoked Petitioner's license to practice law.

On March 20, 1990, Petitioner filed a Petition for Review with the Attorney Discipline Board raising the claims set forth in his present Petition.

On October 25, 1990, the Board entered its opinion affirming the Panel's findings of misconduct, but reducing the hearing panel's order of revocation to a three year suspension. (Petitioner's Appdx. pp. 4-13).

On March 14, 1991, Petitioner filed an Application for Leave to Appeal with the Michigan Supreme Court raising the issues set forth in his Petition for Writ of Certiorari. On March 22, 1991, the supreme court denied the Petitioner's application. The Michigan Supreme Court also denied Petitioner's motion for reconsideration of the court's March 22, 1991 order. (Petitioner's Appdx. pp. 75-76).

ARGUMENT

I.

THE MICHIGAN ATTORNEY DISCIPLINE BOARD AND HEARING PANEL PROPERLY EXERCISED THEIR AUTHORITY IN IMPOSING DISCIPLINE IN THIS CASE.

The constitutional power of the

Michigan Supreme Court to discipline attorneys is granted by Mich. Const. art. VI Sec. 5. (Petitioner's Appdx. pp. 83) Michigan Court Rule 9.108(A) states:

> a) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

(Respondent's Appdx. pp. 18-21).

The Attorney Grievance Commission is a judicially-created investigatory and prosecutorial body and is empowered to conduct inquiries in connection with the conduct of attorneys. The Grievance Administrator and Deputy Grievance Administrator are appointed by the Michigan Supreme Court. The Grievance Administrator has the power and duty to "investigate alleged misconduct of attorneys, including serving a request for

investigation in his own name." Mich. Ct. Rule 9.109 (Petitioner's Appdx. pp. 67) The Michigan Attorney Discipline Board is appointed by the supreme court to adjudiciate these allegations of misconduct. Michigan Court Rule 9.110(A) states:

> A) The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys.

(Respondent's Appdx. pp. 22-23).

Both the Grievance Commission and Discipline Board are subject to the supervisory control of the Michigan Supreme Court and as such, the proceedings are judicial in nature. Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972). See also, Matter of Grimes, 414 Mich. 483, 326 N.W.2d 380 (1982); Falk v. State Bar of Michigan, 411 Mich. 63, 305 N.W.2d 201 (1981); Schlossberg v. State Bar Grievance

Board, 388 Mich. 389, 200 N.W.2d 219 (1972); Ayres v. Hardaway, 303 Mich. 589, 597, 6 N.W.2d 905 (1942); In re Hartford, 282 Mich. 124, 275 N.W. 791 (1937); In the Matter of Mills, an Attorney, 1 Mich. 392, 393-4 (1850).

Petitioner's claim that there is no judicial intervention in the Michigan Attorney disciplinary proceedings is inaccurate. The Michigan Court Rules governing attorney disciplinary proceedings, adopted by the Michigan Supreme Court, evidence the court's substantial judicial involvement in the disciplinary process. Pursuant to the Rules, the Michigan Supreme Court may order discipline including, revocation, suspension, reprimand, probation and restitution. Mich. Ct. Rules 9.106. (Respondent's Appdx. pp. 16-17). A disciplinary proceeding, whether at the investigative or adjudicative phase, is

subject to the direct superintending control of the Michigan Supreme Court. Mich. Ct. Rule 9.107(A). (Respondent's Appdx. p.18) Both the Grievance Commission and the Discipline Board clearly maintain a status far different from mere administrative agencies.

Petitioner's claim that Michigan Attorney Discipline proceedings are "non-judicial" because appeals of Attorney Discipline decisions can only be taken by leave as opposed to appeal by right, mischaracterizes the role of the Michigan Supreme Court in disciplinary proceedings.

First, each discipline case appealed to the Michigan Supreme Court is reviewed by the Court in that the decision to grant or deny leave is based on a review of the record and consideration of

the issued involved.[3] Further, the number of cases in which leave is granted by the Michigan Supreme Court is not an accurate measure of the court's involvement in the discipline process since the court can, and does, modify actions taken by the Board in lieu of granting leave. The Petitioner, in this case, filed an application for leave to appeal to the Michigan Supreme Court, but was denied leave.[4] The Michigan Supreme Court's judicial role is substantial and clearly defined by court rule.

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3. When an application for leave to appeal is filed, the entire original Attorney Discipline Board file is transmitted to the Michigan Supreme Court for review.

4. Matter of Fernando Edwards, No. 87328, Mich. Sp. Ct., filed 12/05/90, the court denied leave to appeal but reduced an order of revocation issued by the Board to a suspension of three years.

The Michigan Supreme Court has always maintained strict judicial control over attorney disciplinary matters and has always reserved final authority in discipline cases to itself. Michigan Court Rule 9.110(A) speaks specifically of the Court's "exclusive constitutional responsibility to supervise and discipline Michigan attorneys." (Respondent's Appdx. p. 22) This responsibility was further recognized in Matter of Grimes:

> It is this Court, however, that has ultimate responsibility to oversee the conduct of the approximately 21,000 members of the State Bar, and keep unsullied the reputation of the profession. When an order of the Attorney Discipline Board is appealed, therefore, the Supreme Court may make any order it deems appropriate, including dismissing the appeal.

414 Mich. 448, 489-490, 326 N.W. 2d 380, 383 (1982). (Emphasis added).

The Michigan disciplinary process is an ordered system in which hearings are conducted and procedural due process is provided to each attorney charged with professional misconduct. The hearing itself is adversarial in nature and the rules governing practice and procedure in a non-jury civil action apply to proceedings before a hearing panel or master. Michigan Court Rules 9.115(A). (Petitioner's Appdx. pp. 97-98)

The Board acted within its specifically delegated authority in adjudicating this matter and imposing appropriate discipline.

ARGUMENT

II.

THE MICHIGAN ATTORNEY DISCIPLINE BOARD AND THE MICHIGAN SUPREME COURT DID NOT ERR IN DENYING PETITIONER'S REQUEST FOR RELIEF FROM THE ORDER OF DISCIPLINE IMPOSED IN THIS CASE.

Petitioner has raised a number of

claims relating to the disciplinary hearing held in this matter. Petitioner's arguments have all been considered by the Attorney Discipline Board and the Michigan Supreme Court and have been held to be without merit.

A. Alleged Prosecutorial Misconduct

Petitioner has raised a claim that counsel for the Michigan Attorney Grievance Commission engaged in prosecutorial misconduct by altering an exhibit. Petitioner was allowed discovery of the documents the Grievance Administrator was likely to offer into evidence, including access to a copy of a check issued by the National Bank of Detroit, for $7,428.87, dated September

16, 1981.[5] The copy of the check had a handwritten note placed upon the page. The handwriting did not appear on the face of the check but was written elsewhere on the page. The note stated:

> "Checked Banks [sic] computer there wasn't [sic] an account in the name of Fletcher Campbell at the time above check was presented. "No Deposit". Check had to have been cashed". Per Anthony Morales NBD Security. 2-10-88.

---

5. Petitioner's statement that the Grievance Commission had "secretly secured" a copy of the check implies that the method by which the AGC obtained the check was improper. However, Michigan Court Rule 9.114(C)(1) permits the Commission to issue a subpoena for production of documents before the administrator or investigator concerning matters then under investigation. (Petitioner's Appdx. pp. 97)

Because the writing was not part of the check, and constituted hearsay, a copy of the check was made so that the writing did not appear. Undoubtedly, had the Grievance Administrator offered into evidence a copy of the page on which the writing did appear, Petitioner would then have claimed the admission of the hearsay statement as prosecutorial misconduct. The master correctly dismissed Petitioner's allegations.

More importantly, Petitioner fails to advise this Court that he obtained discovery concerning the check on July 11, 1988. Additionally, Petitioner was notified of the Grievance Administrator's intention to submit a redacted version of the same check in its Request for Admissions filed on August 30, 1988. Petitioner never answered the Request for Admissions which called upon him to admit the authenticity of the check

at issue.[6]

The evidence established that Petitioner maintained accounts at the National Bank of Detroit in his professional corporation's name at the time the check was negotiated. The check was not deposited directly into one of the accounts maintained by Petitioner. It was the Grievance Commission's position throughout the proceedings that Petitioner presented the check to National Bank of Detroit, negotiated it, received the proceeds, deposited a portion of the proceeds into two accounts and kept the remainder in cash.

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6. Respondent objected to the Request for Admissions as being outside the scope of discovery rules. However, Michigan Court Rule 9.115(F)(4)(d) allows a hearing panel to obtain admissions or otherwise narrow the issues presented. (Petitioner's Appdx. pp. 99).

The Petitioner fails to point out how the admission of the exhibit with the hearsay redacted was prejudicial to his case or misled the master hearing the case.

Further, the Petitioner had an opportunity to call Anthony Morales, (the person whose handwritten note appeared on the check) as a witness during the proceedings, but chose not to do so. The Petitioner has failed to demonstrate how redaction of Mr. Morale's handwritten note resulted in any detriment to him.

Petitioner's second allegation of prosecutorial misconduct, arises from his claim that counsel for the Grievance Administrator caused an exhibit containing hearsay statements (Exhibit #56) to be entered into evidence.

During the investigation of the Wright matter, the file was assigned to Volunteer Investigator, Ronald Karp. Mr. Karp was an attorney who conducted an investigation into the allegations made by

Shirley Wright, the complainant who file the Request for Investigation with the Attorney Grievance Commission. Upon completion of his investigation, Attorney Karp filed a written report with the Attorney Grievance Commission. The report primarily contained a chronology of the history of the case and statements made by Petitioner. The report also contained some hearsay statements of Complainant Shirley Wright and attorney William Taylor. Mr. Taylor testified during the disciplinary hearing before the master. During the course of the hearing, the report of Volunteer Investigator Karp (Exhibit #56) was offered into evidence by counsel for the Grievance Administrator. Petitioner objected to the admissibility of hearsay statements contained in Exhibit 56, except for those statements made by Petitioner to the investigator, Mr. Karp.

The master indicated that the hearsay portions of the report should be redacted, but that the report could be otherwise admitted. Counsel for the Grievance Administrator requested that Petitioner and his attorney meet during the recess to redact the report, but they failed to do so. The report, however, was then included in unredacted form because of the failure of Petitioner and his counsel to agree to the redaction. However, it appears that the master did not consider the report in his findings of misconduct concerning the count charging a False Statement In Connection with a Request for Investigation, but instead, relied upon the testimony of witnesses and other admissible evidence presented at the hearing. (Report of Master, page 15; Petitioner's Appdx. pp. 69-70). On page 15 of the Report, the master stated:

C) Count III--False statements made in connection with a Request for Investigation.

1. Ronald Karp, an attorney, was appointed by the Attorney Grievance Commission to serve as a Volunteer Investigator regarding a Grievance filed by Shirley Wright against Respondent.

2. As part of his duties, Karp interviewed Respondent in April of 1987.

3. Karp prepared a Report embracing his findings, but the document was not introduced as an exhibit at the hearing.

4. Respondent advised Karp that he retained all of the proceeds derived from the judgment in cash, at Wright's request.

5. Since Shirley Wright did not testify, it cannot be shown that Respondent falsely informed Investigator Karp that Wright asked him to hold the funds in cash in order to avoid a garnishment.

6. Respondent falsely reported to Investigator Karp that he held the proceeds derived from the cashier's check of September 16, 1981, in cash. The testimony of Mary Sanders and the exhibits related to the transactions of September 16, 1981, along with other bank exhibits, reveal that Respondent deposited $6,412.87 of

> **the $7,428.87 in two accounts, receiving the remainder in cash. Subsequent to that transaction, he withdrew all but $198.02 from his trust account. Thus, Respondent did not keep the proceeds of the garnishment check at his office, as he represented to Karp.**
>
> CONCLUSION: Respondent committed professional misconduct by knowingly providing false information to a Volunteer Investigator of the Attorney Grievance Commission who was investigating a grievance filed against Respondent.

(Petitioner's Appdx. pp. 69-71)

The findings of misconduct in this case were based on admissible and competent evidence. Petitioner's claim of error is without merit.

B. Speedy Hearing

Petitioner claims that the order of discipline in ADB Case No. 25-88 should be vacated because the hearing was not held within 56 days after the filing of the formal complaint. However, the relevant portion of MCR 9.111 states:

> (B) Powers And Duties. A hearing panel shall do the following:
>
> > (1) Hold a public hearing on a complaint... within 56 days after the date the complaint is filed with the board... A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.

(Petitioner's Appdx. pp.96) (Emphasis added)

Clearly, the rules provide that, if good cause has been shown, a hearing need not be held or completed within the cited guidelines.

Other provisions in the Rules allow for flexibility in hearing and concluding disciplinary cases. For good cause, it is within a panel's discretion to grant one adjournment per party. Mich. Ct. Rule 9.115(F)(1). (Respondent's Appdx. p. 25) The rules also grant panels discretion to order a pretrial hearing for

the purpose of narrowing the issues. Mich. Ct. Rule 9.115(F)(4)(d). (Petitioner's Appdx. 98-99).

The panel, in the instant matter, granted the Grievance Administrator one adjournment for the reason that an expert witness was unable to attend the first hearing date for medical reasons. Further, both parties filed preliminary motions, such as motions to strike, and motions for summary disposition. Petitioner, himself, filed two separate motions to disqualify panel members. On February 1, 1989, after the appointment of a master, Petitioner sought, and was granted, a stay while the Attorney Discipline Board considered his Motion for Relief from Order Appointing Master. Thereafter, Petitioner again sought, and was granted, an adjournment. In view of the many motions filed by the parties, and

the complex nature of the issues, the proceedings were conducted as expeditiously as possible. Petitioner has failed to specify any harm from the delay.

The Michigan Supreme Court on a similar issue -- the timeliness of a hearing panel's report -- held that the rule requiring the filing of a report within 30 days of the conclusion of a disciplinary proceeding should be regarded as a goal and not jurisdictional. The Court found that it would be unreasonable and unfair to both sides to impose a rigid rather than a reasonable time limitation. State Bar Grievance Administrator v Posler, 393 Mich 38, 222 N.W.2d 511 (1974). See also, State Bar Grievance Administrator v Donigan, 403 Mich 172, 267 N.W.2d 909 (1978);

While disciplinary proceedings should be expeditious, there are certain cases which cannot be concluded within the

strict guidelines. The instant case involved such a situation.

C. Consolidation of Formal Complaints

Petitioner claims he was denied due process and a fair trial when the Attorney Discipline Board consolidated Formal Complaints ADB Case Nos. 25-88 and 133-88. It should be noted that, throughout the course of the disciplinary proceedings before the panel, Petitioner never objected to the consolidation or moved for separate trials. Therefore, Petitioner has waived any objection to the consolidation of the two matters.

The Board assigned both Formal Complaints to Wayne County Hearing Panel #11. The Board has the power to assign matters for hearing. Mich. Ct. Rule 9.110(D). (Petitioner's Appdx. pp.95) Having been assigned a matter for hearing,

the panel had the power and duty to set the time, place, and date of hearing. Mich. Ct. Rule 9.115(G). (Respondent's Appdx. pp. 25-26)

On May 26, 1988, a Consolidated Notice of Hearing was issued by the clerk of the Board, embodying the panel's order as to the time, date, and place of hearing on said matters and further providing notice of the consolidation. The clerk had the duty to give notice of the order of the Board. Mich. Ct. Rule 8.105(D). (Respondent's Appdx. p. 14)

The consolidation of the two cases was appropriate. The Michigan rules governing practice and procedure in a non-jury civil action apply generally to a proceedings before a hearing panel. Michigan Court Rule 9.115(A). (Petitioner's Appdx. pp. 97-98) Michigan

court rules provide that when actions involving a substantial and controlling common question of law or fact are pending before the court, it may order the actions consolidated. Michigan Court Rule 2.505(A). (Petitioner's Appdx. p.90) [7]

Consolidation is largely a matter of convenience and the hearing panel had considerable discretion in this area and may have ordered consolidation for its own benefit. Wilson v. Ex-Cell-O Corp, 368 Mich. 61, 117 N.W. 2d 1984 (1962).

In the Mason matter (ADB No. 25-88), Petitioner was charged with acts of neglect, charging a clearly excessive or illegal fee, violating a ruling of the Michigan Court of Appeals to return unearned fees. He was further charged with violating a temporary restraining

---

7. The Michigan rule is drafted substantially in the language of Rule 42 of the Federal Rules of Civil Procedure.

order issued by a probate court by removing said fees from his bank account, making misrepresentations to a probate court as to the disposition of those fees, and violating an order appointing a receiver. The charges in the Mason case, reflect a pattern of misconduct, involving Petitioner's mishandling of money and engaging in misrepresentation to conceal his misconduct.

In the Wright matter, (ADB No. 138-88) Petitioner was charged with commingling and misappropriating client funds, violating a temporary restraining order by removing the funds from his bank account, and making misrepresentations to the Attorney Grievance Commission regarding the disposition of those funds. Thus, charges in the Wright case, also, indicate a pattern of misconduct involving

the mishandling of client funds and misrepresentation to conceal attorney misconduct. This pattern of misconduct was noted by the panel in its Report. (3/1/90, Report, pg. 4) (Petitioner's Appdx. pp.24) Since the charges in the two cases were similar, the Board did not abuse its discretion in consolidating the two matters. Cohen v. Cohen, 125 Mich. App. 206, 335 N.W. 2d 661 (1983).

Moreover, a substantial and controlling question in this proceeding, as exists in all disciplinary proceedings, is whether the subject attorney is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and as an officer of the court. Mich. Ct. Rule 9.103(A) (Respondent's Appdx. pp. 15-16). To answer this question, it was necessary that the matters be consolidated

so that the hearing panel could properly decide this issue based upon the totality of Respondent's misconduct.

D. Appointment of Master

Respondent's argument that the Attorney Discipline Board had no authority to appoint both a hearing panel and master to determine if Respondent committed professional misconduct is without merit and completely contrary to Michigan Court Rules. Respondent has either ignored or failed to note that Michigan Court Rule 9.117 specifically allows for appointment of a master and a hearing panel to determine allegations of misconduct. Michigan Court Rule 9.117 provides that after a hearing is conducted by a master, he or she must file a report with the hearing panel designated by the Attorney Discipline Board. The panel must determine if the record supports the findings of fact and conclusions of law of

the master and impose discipline if warranted. Michigan Court Rule 9.117. (Respondent's Appdx. pp. 26-27)

Petitioner urges a narrow interpretation of the language in Mich. Ct. Rule 9.110(D)(3) relating to the Board's power and duty to "on the filing of a complaint, assign it to a hearing panel or to a master if it appears that the hearing will be a prolonged one".

When a complaint is filed, one usually cannot tell whether a hearing will be prolonged. It is only upon the filing of an answer, or preliminary motions, that one can make projections whether proceedings will be prolonged. Indeed, it was after the parties filed multiple preliminary motions and an extensive list of witnesses that the Board entered an order on December 23, 1988, appointing a

master for the reason that "the hearing will be a prolonged [one] and the Board has determined that the appointment of a master would be appropriate and will serve the interests of justice." (Respondent's Appdx. p. 7) The appointment of a master was in accord with the goal that "proceedings must be expeditious as possible". Mich. Ct. Rule 9.102(A). The Michigan Supreme Court has stated that Subchapter 9.100 is to liberally construed for the protection of the public, the courts, and the legal profession. Mich. Ct. Rule 9.102. (Respondent's Appdx. pp. 14-15)

Petitioner's claim that the evidence did not sustain a finding of misrepresentation to the Attorney Grievance Commission is also without merit. The evidence established that Petitioner misrepresented certain facts to

the Commission's staff during the course of the investigation. Petitioner stated to the Commission's Volunteer Investigator that he had maintained certain client funds in his office safe. This was later proven to be false. Further, Petitioner lied to the Investigator when he stated that he held the funds in the form of cash. The evidence disclosed that Petitioner had deposited the funds into two of his personal bank accounts.

E. Confidentiality of the Board's Records

Petitioner claims that his due process rights were violated when the Board refused his request for access to the Board's minutes in appointing a master or access to the list of masters.

In rejecting Petitioner's claims, on February 17, 1989, the Board held:

> The Board has determined that the Board's minutes and records pertaining to the appointment of a master constitute confidential files and records of the Board within the meaning of MCR 9.126(D). The Board has determined that the request of the hearing panel for appointment of a master in this case was considered by the Board at a special meeting held on November 9, 1988, at which a quorum was present (Members Gurwin, Green, Zegouras, Doctoroff and Hotchkiss). The Board is not persuaded that maintenance or disclosure of a special "masters list" is required for the Board to exercise its authority to appoint a master. . .

(Respondent's Appdx. pp. 10-13)

The files and records of the Board are generally confidential except for formal pleadings, reports, findings, recommendations, discipline, reprimands, transcripts, and orders resulting from hearings. Mich. Ct. Rules 9.126(C) and (D). (Petitioner's Appdx. pp. 99-101). Disclosure of the minutes of the Board reflecting the deliberations underlying

the appointment of a master is not authorized. Indeed, the deliberations of any court are not generally available.

Petitioner claims that the Board engaged in discrimination in selecting Wayne County Hearing Panel #11. The Board maintains a list of panel members. Panels are chosen on a rotation basis. The race and area of practice by individual panel members are not indicated on any list. To do so would invite charges of bias. Petitioner urges a different procedure -- the selection of panels by race and employment. This argument has been rejected by the Michigan Supreme Court in State Bar Grievance Administrator v Grubbs, 396 Mich 275, 278, 240 N.W.2d 233 (1976).

III.

THE MICHIGAN ATTORNEY DISCIPLINE BOARD DID NOT ERR IN IMPOSING A THREE YEAR SUSPENSION OF PETITIONER'S LICENSE TO PRACTICE LAW.

The findings of misconduct made against Petitioner evidence a pattern of misconduct related to the misappropriation of client funds. In short, Petitioner lied, cheated, and stole to his pecuniary advantage. The findings warrant, at the least, a three year suspension from the practice of law because petitioner presents a danger to the integrity of the legal profession as a whole. The Panel noted the following:

> Mr. Campbell is unable to grasp the seriousness of his misconduct or to fully appreciate the nature of his obligations as an officer of the court. The document prepared by the respondent entitled "Power of Attorney and Assignment:. . .giving him a lien

> on the assets of the estate for a fee equal to one-third (1/3) of the amounts received and giving him a "vested interest" in those amounts was, in our opinion, unconscionable. His continued failure to return the excessive fees to that estate, although ordered to do do, constitutes further evidence of the respondent's failure to fulfill his obligations to his former client or the courts.
>
> The findings. . .that the respondent commingled client funds with his own, misappropriated funds of a client and knowingly provided false information during the course of the Grievance Administrator's investigation constitute acts of misconduct which are sufficiently egregious to warrant substantial discipline. More importantly, those separate acts of misconduct suggests a pattern of misconduct.

(Petitioner's Appdx. pp. 22-24).

Petitioner complains of differential treatment -- that the discipline was more severe than that imposed upon other attorneys similarly situated. The Michigan Supreme Court, however, has stated:

> "[W]e are mindful of the sanctions meted out in similar cases, but recognize that analogies are not of great value. 'As a hypothetical proposition, we find dubious the notion that judicial or attorney misconduct cases are comparable beyond a limited and superficial extent. Cases of this type generally must stand on their own facts.'"

Matter of Grimes, 414 Mich 483, 490, 326 N.W. 2d 380 (1982); quoting State Bar Grievance Administrator v Del Rio, 407 Mich 336, 350 285 N.W. 2d 277 (1979).

Nowhere has the Court indicated more strongly the protective purpose of disciplinary proceedings than in instances involving mishandling of client funds. The Michigan Supreme Court has affirmed the disbarment of an attorney who had commingled and converted estate funds for his own use. State Bar of Michigan v Baun (After Remand), 396 Mich 421 240 N.W. 2d 728 (1976). The court, in Baun, cited with approval the Attorney Discipline Board's holding that:

> The conduct of the respondent and the evidence show a willful disregard of his obligations as a fiduciary and trustee. He refused to take any action toward correcting his conduct until compelled to do so by contempt proceedings. His conduct was clearly subversive to the administration of justice. There are a few business relations involving a higher trust and confidence than that of an attorney acting as trustee in the handling of money for his client or by order of the court. The basis of this relationship is one of confidence which destroys that basic confidence and trust clearly to obloquy, contempt, censure and reproach. Foremost among the acts destroying the confidence between the public and the bar is the conversion or misuse of a client's funds...

396 Mich at 423.

The New Jersey Supreme Court, in revoking the license of an attorney who had misappropriated client funds, stated:

> Banks do not rehire tellers who borrow depositors' funds. Our professional standards, if anything, should be higher.

In the Matter of Wilson, 409 A.2d 1153, 1156 (NJ 1979).

Equally deserving of strong condemnation is Petitioner's other proven misconduct. Petitioner, who charged clearly excessive fees, has made an inadequate attempt to repay those fees. He has failed to obey court orders and engaged in a course of fraudulent concealment of his activities by lying to the Attorney Grievance Commission regarding his receipt of the funds.

The courts of this nation have always recognized that honesty is the foundation of the legal profession:

> Honesty is basic to the practice of the law. Clients must be able to rely unquestioningly on the truthfulness of their counsel. A lawyer's word to a colleague at the bar must be the lawyer's bond. A lawyer's representation to the court must be as reliable as a statement under oath.

In re Reback, 513 A2d 226, 231 (D.C. Ct. App. 1986). See also, In re Anson, 730 P.2d 1229 (OR. 1986); In the Matter of Duffy, 697 P.2d 943, 945-46 (N.M. 1985).

Similarly, the Attorney Discipline Board has held in the Matter of Mary E. Gerish, ADB 171-87 (ADB 1989):

> Truth is the cornerstone of the judicial system and the practice of law requires an allegiance and fidelity to truth. . .We believe that revocation of the license to practice law is an appropriate sanction when an attorney violates the fundamental obligation to be truthful.

Petitioner's fundamental inability to appreciate the seriousness of his conduct constitutes a clear and present danger, not only to the public, but to his fellow practitioners whose reputations are now stained by his misconduct. As stated by Justice Whipple, in In the Matter of Mills, 1 Mich. 392, 396 (1850):

> When a license is granted to an attorney, we certify to the world, that he has been 'approved by the court for his good character and learning.' Upon this certificate the public have a right to rely...Should this court, after being officially advised that one of its officers has forfeited the good name he possessed when permitted to assume the duties of his office, still hold him out to the world as worthy of confidence, they would, in my opinion fail in the performance of a duty cast upon them by the public, to see that a power which may be wielded for good for evil is not entrusted to incompetent or dishonest hands. The extreme judgment of expulsion is not intended as a punishment inflicted upon the individual, but as a measure necessary to the protection of the public, who have the right to demand of us, that no person shall be permitted to aid in the administration of justice whose character is tainted with corruption.

Petitioner's three year suspension is far less severe than the discipline imposed in similar cases.

OBJECTION TO INCLUSION OF LEGAL ARGUMENT IN PETITIONER'S APPENDIX

The Petitioner filed a Petition for Writ of Certiorari and an Appendix to the Petition. The first 115 pages of the Appendix contain reproductions of opinions, orders and rules as required by United States Supreme Court Rule 14.1(k). However, following the opinions, orders, and rules, Petitioner has set forth an additional 45 pages of material under the title "Additional Specific Materials Underlying Federal Questions Raised in State Court [see, Sup. Ct. R. 14.1(h) and (k)]". The material Petitioner sets forth on pages 115-160 of his appendix do not include "portions of the record" as required by this Court's rule. These last 45 pages of the Petitioner's Appendix are clearly further legal argument in support

of his Petition for Writ of Certiorari. The presentation of such argument in the Petitioner's Appendix is not proper under the rules of this Court and should have been included in the Petition For Writ of Certiorari. United States Supreme Court Rule 14.1(j) and (k). Moreover, inclusion of an additional 45 pages of argument does not comply with Rule 14.4 and Rule 33 of this Court inasmuch as it exceeds the page limitations set forth in those rules.

The Court should note however, that a portion of this additional legal argument in Petitioner's Appendix is a rehash of arguments set forth in his Petition. Petitioner's further challenge to the master's, hearing panel"s, and Attorney Discipline Board's findings and rulings of misconduct are not based upon violations of any constitutional principles, but simply an attempt on his part to relitigate the facts and charges

of misconduct of which he was found guilty. Such challenges to the sufficiency of the evidence are not a proper subject for review by this Court.

CONCLUSION

Petitioner's claims of error have been fully considered by the Michigan Attorney Discipline Board and the Michigan Supreme Court, who have found Petitioner's claims to be without merit. It is respectfully requested that this Honorable Court deny the Petition for Writ of Certiorari.

Dated: Detroit, Michigan
10-16-91

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Case No. 91-433

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

FLETCHER J. CAMPBELL

Petitioner

vs.

GRIEVANCE ADMINISTRATOR,
STATE OF MICHIGAN,
ATTORNEY GRIEVANCE COMMISSION,

Respondent.

Petition For Writ of
Certiorari To The
Michigan Supreme Court

Respondent's Appendix

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APPENDIX INDEX

POWER OF ATTORNEY
AND ASSIGNMENT.....1

ORDER APPOINTING A
MASTER.....6

ORDER DENYING RESPONDENT'S
MOTION FOR RELIEF FROM THE
ORDER APPOINTING MASTER.....10

MICHIGAN RULES OF
COURT 1991.....14

POWER OF ATTORNEY AND ASSIGNMENT

FOR A VALUABLE CONSIDERATION I hereby assign to FLETCHER J. CAMPBELL, as authorized and permitted by DR5-103(A)(1), and other provisions, all claims, demands, entitlements, judgments, administrative awards, and the proceeds thereof, and all causes of actions which I now have, and which I may have hereafter for monies being held by the Estate of BESSIE IRWIN and/or its agent(s), servant(s), guardian, conservator, or employee(s) arising out of a Probate Action being Case Number 763,105.

I irrevocably appoint my attorney FLETCHER J. CAMPBELL, or his designee, my attorney-in-fact in the premises, to all acts, matter and things deemed necessary

to desirable by any such authorized person, with full power and authority in my name, or that of the estate for the sole benefit of FLETCHER J. CAMPBELL to sue for, or compromise and to recover and receive all or part of the acquired lien granted by this assignment to secure his attorney fee and/or expenses, which said amount is equal to thirty-three and one-third (33 1/3%) percent of any amounts realized through compromise, suit, judgments, administrative awards, entitlements, and demands.

That such action shall not limit or prejudice my right to recover for the estate's own benefit all sums in excess of those amounts representing the agreed upon reasonable value ot the attorney fees and/or expenses, or other sums to which I may be entitled.

That it is agreed and understood that I may, after execution of this instrument, at any time, seek or obtain other counsel to intercede in the estate's behalf in this cause, that however, even though other counsel is obtained thereafter, I expressly agree that such interest under this assignment is considered vested in the said FLETCHER J. CAMPBELL, and shall not be disturbed or altered in any fashion in terms of fee entitlement in that the said parties have specifically relied upon this mutual understanding in the execution of this instrument and the same is deemed material to the undertaking of this agreement and not mere recital.

That further I hereby appoint and authorized FLETCHER J. CAMPBELL, as my attorney-in-fact to sign, edorse or transfer any drafts or checks received by

the estate, through its conservator hereunder, and deposit same to FLETCHER J. CAMPBELL'S Trust Account to be distributed as herein provided.

DO NOT SIGN THIS DOCUMENT UNTIL YOU HAVE READ AND UNDERSTOOD THE TERMS AND CONDITIONS OF THE SAME: YOUR SIGNATURE BEING PROOF THAT YOU HAVE READ AND UNDERSTAND THE TERMS AND CONDITIONS OF THIS AGREEMENT.

Estate of Bessie Irwin

_____ BY_____

(Ms.) CHERYL PICKENS OPHELIA MASON
It's Guardian,
Conservator and
Assignor

_____

(MRS.) MARETTA MING

This foregoing instrument was acknowledged before me this 26th day of June 1984, by OPHELIA MASON, the Guardian and Conservator or the Estate of BESSIE IRWIN.

_____

NOTARY PUBLIC, MACOMB COUNTY, MICHIGAN

(Acting in Wayne)

MY COMMISSION EXPIRES: 3-18-85

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

V ADB 133-88; 25-88

Fletcher J. Campbell, P-11544,

Respondent.
_____/

ORDER APPOINTING A MASTER

Considered by the Attorney Discipline Board 333 W. Fort Street, Suite 1260, Detroit, MI

PRESENT: Hanely M. Gurwin, Chairman

The Attorney Discipline Board has received a written request from David I. Rosin, chairman of Wayne County Hearing Panel #11 requesting that the Board appoint a master to take testimony, adduce evidence and report findings to the panel. The Board has considered the panel's request in light of the pleadings filed to

date including the witness lists submitted by the respective parties. The Board is authorized by MCR 9.110(D)(3) to assign a complaint to a master if it appears that the hearing will be a prolonged one and the Board has determined that the appointment of a master would be appropriate and will serve the interests of justice.

NOW, THEREFORE,

IT IS ORDERED that Steven M. Kaplan is hereby appointed a master to conduct hearings as soon as may be practicable.

IT IS FURTHER ORDERED that such hearings shall be conducted at the office of the Attorney Discipline Board, 333 W. Fort Street, Suite 1260, Detroit, MI unless otherwise ordered by the master and

such hearings shall be conducted in conformity with the provisions of MCR 9.115.

IT IS FURTHER ORDERED that the master shall file a report on his decision on the misconduct charges including a certified transcript, pleadings, exhibits, briefs, and findings of fact.

IT IS FURTHER ORDERED that if the master finds that the charge of misconduct is not established by a preponderance of the evidence, he must enter an order dismissing the complaint, in accordance with MCR 9.115(J)(4).

IT IS FURTHER ORDERED that if the master finds that the charge of misconduct is established by a perponderance of the evidence, his report and findings shall be delivered to the hearing panel and the panel shall conduct a separate hearing, as

soon thereafter as practicable, to determine the appropriate discipline, in accordance with MCR 9.115(J)(2).

Attorney Discipline Board

By_____

Hanley M. Gurwin, Chairman

Dated: DEC 23 1988

A TRUE COPY

ATTORNEY DISCIPLINE BOARD

_____

Secretary/clerk

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

Grievance Administrator
State of Michigan
Attorney Grievance Commission,

Petitioner,

V ADB 133-88; 25-88

Fletcher J. Campbell, P-11544,

Respondent.
_____/

ORDER DENYING RESPONDENT'S MOTION FOR RELIEF FROM THE ORDER APPOINTING MASTER

Considered by the Attorney Discipline Board 333 W. Fort Street, Suite 256, Detroit, MI 48226

PRESENT: Hanley M. Gurwin, Chairman
Remona A. Green, Vice-Chairman
Theodore P. Zegouras, Secretary
Martin M. Doctoroff, Member
Robert S. Harrison, Member
Linda S. Hotchkiss, Member
Patrick J. Keating, Member

The Attorney Discipline Board has considered the respondent's motion for relief from an order issued by the Board on December 23, 1988 appointing Steven M.

Kaplan as a master, and the Board has considered the respondent's memorandum of law in support of that motion. The Board is not persuaded that its appointment of a master was contrary to the powers and duties granted to the Board by MCR 9.110(D)(3). The Board has determined that the Board's minutes and records and pertaining to the appointment of a master constitute confidential files and records of the Board within the meaning of MCR 9.126(D). The Board has determined that the request of the hearing panel for appointment of a master in this case was considered by the Board at a special meeting held on November 9, 1988 at which a quorum was present (Members Gurwin, Green, Zegouras, Doctoroff and Hotchkiss). The Board is not persuaded that maintenance or disclosure of a special "masters list" is required for the Board

to exercise its authority to appoint a master. The Board is not persuaded that Steven M. Kaplan should be disqualified to sit as a master in this case by reason of his employment as an assistant prosecutor for Macomb County.

NOW THEREFORE,

IT IS ORDERED that the respondent's motion for relief from order appointing master is DENIED.

IT IS FURTHER ORDERED that the stay of proceedings issued by the Board on February 1, 1989 is VACATED, effective with the filing of this order.

IT IS FURTHER ORDERED that unless otherwise ordered, the hearing before Master Steven M. Kaplan shall proceed on the scheduled date, Monday, March 6, 1989.

ATTORNEY DISCIPLINE BOARD

By_____

Hanley M. Gurwin, Chairman

Dated: FEB 17 1989

A TRUE COPY

ATTORNEY DISCPLINE BOARD

By_____

Secretary/Clerk

RULE 8.105(D) GENERAL DUTIES OF CLERKS

(D) Notice of Judgments, Orders, and Opinions. Notice of a judgment, final order, written opinion or findings filed or entered in a civil action in a court of record must be given forthwith in writing by the court clerk to the attorneys of record in the case, in the manner provided in MCR 2.107.

RULE 9.102(A) CONSTRUCTION; SEVERABILITY

(A) Construction. Subchapter 9.100 is to be liberally construed for the protection of the public, and the legal profession and applies to all pending matters of misconduct and reinstatement and to all

future proceedings, even though the alleged misconduct occurred before the effective date of subchapter 9.100. Proceedings must be as expeditious as possible.

RULE 9.103 STANDARDS OF CONDUCT FOR ATTORNEYS

(A) General Principles. The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice

law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.

(C) Duty to Assist Administrator. An attorney shall assist the administrator in the investigation, prosecution, and disposition of a request for investigation or complaint filed with or by the administrator.

RULE 9.106 TYPES OF DISCIPLINE; MINIMUM DISCIPLINE; ADMONISHMENT

Misconduct is grounds for:

(1) revocation of the license to practice law in Michigan;

(2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court;

(3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose;

(4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C);

(5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline;

RULE 9.107 RULES EXCLUSIVE ON DISCIPLINE

(A) Proceedings for Discipline. Subchapter 9.100 governs the procedure to discipline attorneys. A proceeding under subchapter 9.100 is subject to the superintending control of the Supreme Court. An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice.

RULE 9.108 ATTORNEY GRIEVANCE COMMISSION

(A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

(B) Composition. The commission consists of 3 laypersons and 6 attorneys appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the commission a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates for the 1-year terms shall coincide appropriately with the 3-year membership terms of those officers and the other commission members. The Supreme Court may reappoint these officers for additional terms and may remove these officers prior to the expiration of a term. An officer appointed to fill a mid-term vacancy shall serve the remainder of that term and may be reappointed to serve a full term.

(D) Internal Rules.

(1) The commission must elect annually from among its membership a secretary to keep the minutes of the commission's meetings and issue the required notices.

(2) Five members constitute a quorum. The commission acts by majority vote of the members present.

(3) The commission must meet monthly at a time and place the chairperson designates. Notice of a regular monthly meeting is not required.

(4) A special meeting may be called by the chairperson or by petition of 3 commission members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.

(E) Powers and Duties. The commission has the power and duty to

(1) recommend attorneys to the Supreme Court for appointment as administrator and deputy administrator;

(2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys;

(3) supervise the administrator and his or her staff;

(4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;

(5) annually write a budget for the commission and the administrator's office (including compensation) and submit it to the state bar board of commissioners for approval;

(6) submit to the Supreme Court proposed changes in these rules; and

(7) annually submit to the Supreme Court a report summarizing the commission's activities during the past year; and

(8) perform other duties provided in these rules.

RULE 9.110 ATTORNEY DISCIPLINE BOARD

(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys.

(B) Composition. The board consist of 5 attorneys and 2 laypersons appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

RULE 9.113 ANSWER BY RESPONDENT

(A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b), the respondent shall file with the administrator a signed, written answer in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. The administrator may allow further time to answer. Misrepresentation in the answer is grounds for discipline. The administrator shall provide a copy of the answer and any supporting documents to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.

(B) Refusal or Failure to Answer.

(1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.

(2) The failure of a respondent to answer within the time permitted is misconduct. See MCR 9.104(7).

(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted to a hearing panel for adjudication.

(C) Attorney-Client Privilege. A person who files a request for investigation of an attonrey waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation. [Amended effective June 1, 1987; February 1, 1991]

RULE 9.115(F)(1) HEARING PANEL PROCEDURE

(F) Prehearing Procedure.

(1) Extensions. If good cause is shown, the hearing panel may grant one extension of time per party for filing pleadings or may grant one adjournment per party of a hearing. Additional requests may be granted by the board. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.

RULE 9.115(G) HEARING PANEL PROCEDURE.

(G) Hearing Time and Place; Notice.

The board or the chairman of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of

the hearing panel on the administrator, the respondent, the complainant, and any attorney of record at least 21 days before the initial hearing. Unless the chairperson otherwise directs, the hearing must be in the county in which the respondent has or last had his or her office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel or to a master.

RULE 9.117 HEARING PROCEDURE BEFORE MASTER

If the board assigns a complaint to a master, the master shall hold a public hearing on the complaint and receive evidence. To the extent that MCR 9.115 may be applied, it governs procedure before a master. After the hearing, the master shall prepare a report containing

(1) a brief statement of the proceedings,

(2) findings of fact, and

(3) conclusions of law.

The master shall file the report with a hearing panel designated by the board and serve a copy on the administrator and the respondent. Within 14 days after the report is filed, the administrator or the respondent may file objections to the report and a supporting brief. The panel must determine if the record supports the findings of fact and conclusions of law and impose discipline, if warranted. Further proceedings are governed by MCR 9.118.